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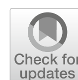

EXTRADITION AND WHOLE LIFE SENTENCES

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ABSTRACT. Sentences of life imprisonment without a prospect of adequate review and release are prohibited in States party to the European Convention on Human Rights. Should the same principle apply when extradition is sought to States not party to the Convention? In *Sanchez Sanchez v United Kingdom* (2022), the Grand Chamber of the European Court of Human Rights applied a less strict standard for potential extraditees facing life without parole. We analyse this decision and its repercussions in light of the history of international cooperation in extreme punishment cases between Europe and the USA and recent interpretations of the new standard. The article concludes with an assessment of the level of proof litigants must present to satisfy the *Sanchez Sanchez* test and of how the law could continue to prevent inhuman and degrading treatment of extraditees facing life sentences.

I INTRODUCTION

In all but 33 countries in the world, the State has the power to imprison persons until they die, and this power is regarded as a legitimate means of punishing serious crimes.[1] In Europe, however, the law has increasingly recognised that if such an exercise of power is untrammelled, it is open to abuse. Accordingly, the European Court of Human Rights (ECtHR) holds that prisoners serving life sentences, while enjoying no right to release, must nevertheless have a prospect of release coupled with a clear process for determining whether penological justifications support continued imprisonment. Failure to meet these requirements, the Grand Chamber of the

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[1] D van Zyl Smit and C Appleton, *Life Imprisonment a Global Human Rights Analysis* (Harvard University Press 2019), xiii.

ECtHR found in *Vinter and Others v United Kingdom* (2013),[2] would make a life sentence inhuman and degrading, and thus infringe Article 3 of the European Convention on Human Rights (ECHR).[3] While States party to the ECHR have a duty to prohibit torture or inhuman or degrading punishment or treatment, such a perspective on whole life imprisonment is not universally held.[4] In the USA in particular, life imprisonment without the prospect of parole (LWOP)—a punishment enforced in such a way that it excludes release in all but the most exceptional and unpredictable circumstances—is regarded as fully acceptable for adults. More than 60 countries worldwide provide for similar sentences, which, outside the USA, are referred to interchangeably as LWOP or whole life sentences.[5]

This paper addresses what happens when these differing perspectives and mandates on death-in-prison sentencing collide in the context of extradition. The extradition context—that of international cooperation in matters of crimes and punishments—is a significant one when it comes to understanding and adjudicating lifetime sentences. Extradition forces countries to consider closely what they do with life sentences and whether what they do meets the minimum actions that States must take to uphold human rights. By examining life sentences and extradition, in other words, one gets to the core of what is, and what States find to be, objectionable about forms of life imprisonment.

The jurisprudence of the ECtHR emphasises both the importance of international cooperation in criminal matters *and* the absolute nature of Article 3 of the ECHR. On the one hand, any cooperation that could result in a person being sent against their will from a State legally bound to respect the prohibitions set by Article 3 to a State not so bound (e.g., when a non-party State asks that a person be extradited to be tried on an offence for which they may be punished by a sentence infringing Article 3) potentially risks a person being subjected to inhumane treatment. On the other hand, law governing extradition worldwide has long valued international cooperation in penal matters to prevent injustice, be it enshrined in treaties or derived from fundamental human rights principles. Yet there are limits.

[2] *Vinter v United Kingdom* (2016) 63 EHRR 1.

[3] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[4] On the absolute nature of Article 3, see N Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart 2021).

[5] See Van Zyl Smit and Appleton, *supra* note 1.

The UN Model Treaty on Extradition, for example, stipulates that treaties should exclude extradition "[i]f the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment".[6] Under this provision, a requested State may refuse extradition, for example, if "the offence for which extradition is sought carries the death penalty under the law of the requesting State".[7] Indeed, the death penalty context is an important foundation for extradition and whole life sentencing for a couple of reasons: first, the significance of human rights and extradition in the ECtHR began with a death penalty case; second, the way in which the ECtHR has handled extradition in the death penalty context offers a significant point of comparison for how the Court deals with extradition and other extreme punishments, including the life sentence.

This article begins with a detailed historical discussion of extradition as it intersects with life sentencing. We open by looking at the ECtHR's initial application to extradition of the Article 3 limitation on inhuman or degrading punishment, which took place in a case in which a death sentence might have been imposed. We then describe how ECtHR jurisprudence has since evolved to recognise that a whole life sentence is, like the death penalty, inhuman or degrading as it does not provide for a prospect of release and an appropriate process for considering whether continued detention of the life sentenced prisoner is justified. Turning to the context of extradition, we track the evolution of ECtHR jurisprudence on extradition and life sentencing to a point at which at least one section of the Court held that extradition of someone facing a whole life sentence should be prevented—the point at which ECtHR jurisprudence stood until quite recently.

The second half of the paper turns to recent developments. In *Sanchez Sanchez v United Kingdom* (2022)[8], the Grand Chamber of

[6] Art 3(f) of the UN Model Treaty on Extradition: UNGA, Model Treaty on Extradition: resolution A/RES/45/116, adopted by the General Assembly, 14 December 1990.Other limits include that persons should never be extradited for offences of a political nature, or for an offence that is not criminalised in both the requesting and the requested State. *Ibid*, art 2.1.

[7] *Ibid*, art 4(d). However, a refusal on this ground may be set aside if the requesting State gives "such assurance that the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out". A footnote to this provision indicates that countries may wish to apply the same restriction on the death penalty to the imposition of a life, or indeterminate, sentence. *Ibid*, art 4(d).

[8] *Sanchez Sanchez v United Kingdom* (2023) 76 EHRR 16.

the European Court of Human Rights applied a less strict standard for potential extraditees facing life without parole. Examining the decision of the Grand Chamber in *Sanchez Sanchez v United Kingdom*, we analyse how, while *Sanchez Sanchez* reaffirms the ECtHR's commitment to both international cooperation in criminal matters and the absolute prohibition on torture and inhuman and degrading punishment or treatment in Article 3, it also undermines the latter commitment by setting a new standard for persons facing an LWOP sentence on extradition—a standard less strict than for those sentenced to LWOP in a State party to the ECHR. The few decisions relying on *Sanchez Sanchez* to date take application of the new standard from the realm of possibility to actuality. In those decisions, one can see cracks in the foundation of the court's reasoning, and one can also begin to perceive what is going to be required of litigants seeking to meet the court's standard.

The emphasis of this paper is ultimately on addressing those cracks in the foundation of the new standards and clarifying what proof litigants will have to present to satisfy the two steps of the courts new measure. More generally, we consider the wider implications of the *Sanchez Sanchez* judgment for extradition proceedings, and propose various ways in which extradition can still limit the use of LWOP sentences worldwide.

II EXTRADITION, HUMAN RIGHTS, AND THE LIFE SENTENCE: A BRIEF HISTORY

2.1 *The Vanguard Example of the Death Penalty*

Many States have long outlawed the death penalty and refused to extradite persons who could be subject to it. Some States have also written into their treaties a power to deny extradition where a potential extraditee would face a death sentence. In international law, however, the application of general human rights criteria to prohibit extradition to face a particular form of punishment is surprisingly recent.[9] Indeed, the principle that extradition must be denied as a matter of international human rights law dates only to the decision of the ECtHR in 1989 in *Soering v UK*, a death penalty case.[10] Understanding the details of *Soering*—the case that in effect inserted

[9] In contrast to a specific treaty criterion. See J Dugard and C Van den Wyngaert, "Reconciling Extradition with Human Rights" (1998) 92 *AJIL* 187.

[10] *Soering v United Kingdom* (1989) 11 EHRR 439.

human rights standards into international cooperation in criminal matters—is essential for assessing how human rights principles are applied to cases that raise the possibility of extradition to a life sentence.

In *Soering*, the British government asked the USA for a guarantee that if Soering were convicted, he would not be sentenced to death. The USA declined, stating that it was unable to offer such a guarantee, as it could not interfere with prosecutorial or judicial decisions at the state level; all it could do was ask the sentencing court not to impose a death sentence. The UK, not wanting to undermine international cooperation in a serious criminal matter, was prepared to allow Soering to be extradited without a firm guarantee. Soering took the matter to the ECtHR, which held that Soering, a German citizen, could not be extradited to the USA to face a possible death sentence because waiting for the sentence to be implemented would infringe the Article 3 prohibition against inhuman or degrading treatment or punishment.

Since *Soering*, Europe and other regions of the world have recognized the death penalty as contrary to human rights in all circumstances, no matter how it is implemented.[11] As a result, States that are asked to transfer or extradite a prisoner now routinely require the requesting State to guarantee a death sentence will not be imposed. With respect to the USA in particular, it is significant to note that international cooperation in criminal matters continued after *Soering*. When the UK informed the USA that the ECtHR ruling meant the UK could not go ahead with extradition, the US government eventually delivered what the UK sought all along, an absolute guarantee that Soering would not face the death penalty.[12] Soering was then extradited, convicted, and sentenced to life imprisonment with the possibility of parole.[13] Since *Soering,* the

[11] ECHR law now outlaws capital punishment, not only on the basis of Art 3 of the ECHR but also on the basis of Art 2, which guarantees the right to life: *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9. In addition, further protocols to the ECHR make the prohibition explicit.

[12] See Res 54 of the Committee of Ministers (12 March 1990) https://hudoc.echr.coe.int/eng?i=001-55486.

[13] In 2019, after having served 33 years, Soering was transferred back to Germany and conditionally released. The case generated vast publicity, in Germany in particular, not only about the death penalty, but also how life sentences are enforced in a way that is human rights compatible: "Jens Söring: Deutscher kommt nach jahrzehntelanger Haft in den USA frei" *Zeit Online* (26 November 2019) https://

USA, when requesting the extradition, has regularly given diplomatic assurances that the death penalty will not be imposed.[14]

In sum, *Soering* was important because it established in international law the principle that extradition could be restricted on human rights grounds when it would enable a punishment—there, the death penalty—that is inhuman or degrading. The *Soering* judgment set a foundation for questioning whether such a principle could and should also be applied to other punishments, including forms of life imprisonment that infringe human rights. Also important, the ECtHR ruled in *Soering* that the prohibited inhuman and degrading treatment was *not merely the execution itself, but the death row phenomenon*—that is, the practice in the USA of holding a person awaiting execution in prison for a long period of time and under restrictive conditions. Such treatment has much in common with the lived experience of people sentenced to whole life sentences, who rather than waiting for execution nevertheless wait to die imprisoned.[15]

2.2 *Whole Life Sentences as Human Rights Violations*

It was perhaps inevitable that as life imprisonment became the primary sentence imposed in Europe, and elsewhere, for the most serious offences in the second half of the 20th century, its compatibility with fundamental human rights guarantees would be subjected to

Footnote 13 continued
www.zeit.de/politik/ausland/2019-11/jens-soering-doppelmord-haft-freilassung-abschiebung.

[14] B Malkani, "The Obligation to Refrain from Assisting the Use of the Death Penalty" (2013) 62 *ICLQ* 523. Art 7 of the current Extradition Treaty between UK and the USA (Treaty Series No. 13 (2007)) provides explicitly:When the offense for which extradition is sought is punishable by death under the laws in the Requesting State and is not punishable by death under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out.Such "assurance" is now routinely given by the USA. However, the *Soering* decision remains significant when forms of punishment other than the death penalty, which are not governed explicitly by an extradition treaty, are challenged on grounds that they too are inhuman and degrading. In such instances, the specific provisions of the extradition treaties between the requested and requesting States are not of primary importance.

[15] See K Hartman, ed., *Too Cruel, Not Unusual Enough* (The Other Death Penalty Project, 2013).

close scrutiny in much the same way as the death penalty.[16] After all, both life and death sentences could be understood as designed to end with a person's death in confinement. Indeed, the ECtHR's finding in *Soering* that the death penalty was inhuman and degrading because of the long and anxious wait experienced by condemned prisoners preceding execution can be compared directly to LWOP. In both instances, once appeals to the courts have been exhausted, there is no prospect of release other than the capricious possibility of a commutation by the head of state.

The ECtHR, however, was slow to confront the issue. Rather than immediately address the legitimacy of whole life sentences under Article 3, the Court first focused on the need for due process in decisions on the release of life sentenced prisoners.[17] A series of judgments, most involving people serving life sentences in the UK, culminated in 2002 in the case of *Stafford v United Kingdom*, in which the Grand Chamber observed that the legality of continued detention after the expiry of a minimum period depended on whether the incarcerated person posed a risk to society.[18] Risk to society might

[16] Van Zyl Smit and Appleton, *supra* note 1, p. xiii.

[17] D van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Kluwer, 2002), 113–124. The question of whether, in national law, life imprisonment per se infringed fundamental human rights standards was raised in German litigation as early as 1976, when the Federal Constitutional Court was confronted by an appeal against a decision of a lower court that held that all life imprisonment was contrary to human dignity and therefore unconstitutional. In what in Germany is known simply as the *life imprisonment* judgment, the Federal Constitutional Court accepted that the principle of human dignity required that all prisoners had to be given the opportunity to resocialise and that they should have the prospect of being returned to free society once they had served the part of their required for purposes of punishment. (45 BVerfGE 187, Judgment of 21 June 1977). The Federal Constitutional Court drew two key conclusions from these principles. First, prisoners sentenced to life imprisonment had a constitutional right to be provided with opportunities to resocialise in order to prepare themselves for possible release. Secondly, the recognition of the human dignity of people serving life sentences went hand in hand with the requirements of the *Rechtsstaat* in such a situation. There had to be clear, judicially-controlled procedures for setting minimum terms to be served and for determining whether prisoners could be released once their resocialisation resulted in their not posing further danger to society. The possibility that the head of state might intervene to pardon such prisoners was held to be entirely inadequate. (In Germany, this would be ministers president of the *Länder* (states).)

[18] *Stafford v United Kingdom* (2002) 35 EHRR 32. This applied to all life sentence cases where a minimum period had been set after which review had to take place, including of mandatory life sentences for murder.

change over time, the Court observed, and the detention might cease to be lawful.[19] In 2009, in *Kafkaris v Cyprus,*[20] the Grand Chamber confronted the wider issue of whether a life sentence with no specified minimum period after which imprisonment must be reconsidered could infringe Article 3. A divided bench, however, merely decided that Kafkaris nevertheless had a prospect of release and therefore did not inquire into the process necessary to avoid violating Article 3.[21]

A crucial shift came in 2013, in *Vinter v United Kingdom*,[22] when the Grand Chamber held for the first time that a life sentence with *no clear prospect of release* infringed Article 3. In its judgment, the Court considered a wide range of comparative and international material, much of which indicated the problematic nature of whole life imprisonment.[23] The ECtHR recognized that life imprisonment could be imposed, even enforced until the prisoner serving it died in prison, if the individual remained a risk to society. However, the ECtHR also emphasised that this applied only if the prisoner had access to opportunities to rehabilitate themselves, so that the penological grounds for their continued detention could fall away, and if an appropriate procedure for considering their release was in place.[24]

A noteworthy feature of the Grand Chamber judgment in *Vinter* was that it saw these requirements as *integral* to the absolute prohi-

[19] It would thus be incompatible with Art 5(1) of the ECHR. Moreover, Art 5(4) of the ECHR required that the continued lawfulness of detention had to be determined by an independent and impartial tribunal, with the power to order release, following a procedure containing the necessary judicial safeguards, including the possibility of an oral hearing.

[20] *Kafkaris v Cyprus* (2009) 49 EHRR 35.

[21] The procedural questions were not discussed further in the majority judgment as the complainant had not raised arguments based on Art 5 of the ECHR. However, in a separate concurring opinion in *Kafkaris*, Judge Bratza noted that an argument based on Art 5(4) could be applied to require specific procedures to be followed in all cases where release from life imprisonment had to be considered.

[22] *Vinter v United Kingdom*, *supra* note 2.

[23] In applying this material, the Grand Chamber explicitly adopted the same approach as the German Federal Constitutional Court had 37 years before. *Ibid*, para 113.

[24] *Ibid*, paras 113 and 119. The Grand Chamber found further support for the "commitment to both the rehabilitation of life sentence prisoners and to the prospect of their eventual release … in the practice of the Contracting states", as well as in a range of Council of Europe and international instruments on the treatment of such prisoners. *Ibid*, para 117; See also D van Zyl Smit, "Outlawing irreducible life sentences – Europe on the brink?" (2010) 23(1) *Federal Sentencing Reporter* 39. *Ibid*, para 116.

bition on torture and inhuman and degrading punishment offered by Article 3, and stipulated procedural requirements for considering release in a way that linked them to rehabilitation.[25] The Grand Chamber emphasised that, as a matter of fundamental human rights, incarcerated people serving life sentences, like all other sentenced prisoners, had to be offered opportunities for rehabilitating themselves. For this reason, as a matter of law and practice, people sentenced to life were entitled to know at the beginning of their sentence what they needed to do in order to participate in their own rehabilitation.[26] They also needed to know when such decisions would be made and by whom; this knowledge was essential too for their rehabilitative process to proceed. The Court in *Vinter* did not prescribe the form such decisions should take, as it recognised that States should be allowed a margin of appreciation. Subsequent judgments of the Court, however, favoured a judicial process to decide on release and, where the decision was made by the executive, it required judicial review of the initial decision.[27] Significantly, *Vinter* made clear that, on grounds of human dignity, "compassionate release for the terminally ill or physically incapacitated" was not sufficient to meet the requirements of Article 3.[28] For a move out of prison to be regarded as "release", it had to include the prospect of returning to the community as an *active* member of society, not merely being allowed to die outside at home or in hospice rather than in prison.

Subsequent decisions of the ECtHR have further defined what Article 3 requires of life sentences. Most significantly, in *Murray v the Netherlands*, the Grand Chamber provided a comprehensive overview of various criteria, prominent among them ensuring that a system of life imprisonment provides opportunities for rehabilitation both in

[25] The Court declined to accept the approach suggested by Judge Bratza in *Kafkaris* and to set specific procedural requirements for considering release from life imprisonment by applying the due process standards prescribed in Article 5(4) of the ECHR. *Ibid*, para 132. It did so on narrow procedural grounds. D van Zyl Smit, P Weatherby and S Creighton ("Whole Life Sentences and the Tide of European Human rights Jurisprudence: What is to be Done?" (2014) 14 *Human Rights Law Review* 59, 73–77) argue that this approach is not only a misunderstanding of the relevant precedents, but is also substantively incorrect, as decisions for release from all types should meet the full range of procedural safeguards provide by Article 5 of the ECHR.

[26] *Vinter v United Kingdom*, *supra* note 2, para 122.

[27] *See Hutchinson v United Kingdom,* Application no. 57592/08. Judgment of 17 January 2017, para 47.

[28] *Ibid*, para 127.

law and in fact. Without the latter, Article 3 would be of no use to an incarcerated person preparing an application for release. Moreover, the Grand Chamber held, the Court could take into account "statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon".[29] In short, the details of the process matter.

Murray also questioned the shortcomings of release decisions made by a head of state or another arm of the executive exercising unfettered discretion. Referring to its 2014 decision in *Lazlo Magyar v Hungary,*[30] which decried the lack of reasons provided in presidential decisions on release of life sentenced prisoners in Hungary, the Court emphasized the importance of a structured, reasoned process:

> [T]he Court is not persuaded that the institution of presidential clemency, taken alone (without being complemented by the eligibility for release on parole) and as its regulation presently stands, would allow any prisoner to know what he or she must do to be considered for release and under what conditions. In the Court's view, the regulation does not *guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might be*. The Court is therefore not persuaded that, at the present time, the applicant's life sentence can be regarded as reducible for the purposes of Article 3 of the Convention.[31]

Unfettered presidential decision making was also found to infringe Article 3 in cases arising in Lithuania and Ukraine in 2016[32] and 2019[33], respectively. In all, it is clear that since 2013 the jurisprudence of the ECtHR has developed an expanded but coherent interpretation of Article 3 as the sole source of standards for determining whether a life sentence without a clear date for review meets the standards of the ECHR.

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[29] *Murray v Netherlands*, (2017) 64 EHRR 3, para 100.

[30] *László Magyar v Hungary*, Application no 73593/10, Judgment of 20 May 2014.

[31] *Ibid*, para 58. Emphasis added. The shortcomings of the exercise of presidential discretion in Hungary has been restated in further decisions of the ECtHR in cases in 2016 and 2021. *T.P. and A.T. v. Hungary* Application nos 37871/14 and 73986/14, Judgment of 4 October 2016; *Sándor Varga v Hungary* Application no 9735/15, Judgment of 7 June 2021.

[32] *Matiošaitis v Lithuania*, Application nos 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, Judgment of 23 May 2017.

[33] *Petukhov v Ukraine no. 2*, Application no 41216/13, Judgment of 12 March 2019.

This brief history of ECtHR jurisprudence on whole life sentences and Article 3 is important for thinking through just what it is that is objectionable about life imprisonment to Europeans. As we have seen, it is not necessarily that people are kept in confinement until they die. Rather, what is deemed objectionable under Article 3 is the failure to provide a structured process of considering release and a prospect of hope. Having realized that certain forms of life imprisonment are objectionable and infringe Article 3 because they provide no such prospect of hope and structured process for considering release, the ECtHR was soon invited to look at whole life sentences in the context of extradition.

2.3 *Whole Life Sentences and Extradition*

Given the emphasis on international cooperation that pervades extradition protocol, one might expect States to resist extradition only where it would violate principles or beliefs that are deeply held. As noted above, prior to the 2013 judgement in *Vinter*, attempts to argue along human rights lines against the extradition of persons from European States to face whole life sentences mostly failed.[34] This was largely because it was not yet crystal clear what was required in order to hold a life sentence inherently inhuman or degrading, particularly in cases of discretionary whole life sentences. Such uncertainty emboldened the ECtHR, for example, to hold that the way in which a State not party to the ECHR evaluated the forms of life imprisonment extraditees might face should not be examined as strictly as it would be in a State party to the ECHR. *Harkins and Edwards v United Kingdom* (2012),[35] for example, involved an extradition request from the USA, where the extraditee potentially faced an LWOP sentence. The Fourth Section of the ECtHR held that, although the requirements of Article 3 were "absolute", "the Convention does not purport to be a means of requiring the Con-

[34] This includes the United Kingdom (*R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 33) and even Germany (BVerfGE 113, 154, Judgment of 6 July 2005). However, in 2010 the German Constitutional Court prevented extradition of Turkey on the grounds that powers of pardon of Turkish president were too restricted to allow a fair consideration of release from life imprisonment: D van Zyl Smit, "Outlawing Irreducible Life Sentences: Europe on the Brink? (2010) 23(1) Federal Sentencing Reporter 39, 45.

[35] *Harkins and Edwards v United Kingdom* (2012) 55 EHRR 19. See also *Ahmad v United Kingdom* (2013) 56 EHRR 1.

tracting States to impose Convention standards on other States".[36] It added: "This being so, treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case."[37] This, despite a long line of prior ECtHR judgments holding that the Article 3 test should not be watered down in any kind of case.[38]

The Grand Chamber judgment in *Vinter*, however, offered a clear test that could also be applied in cases of extradition. In 2014, in *Trabelsi v Belgium*, the former Fifth Section of the ECtHR applied the criteria established in *Vinter* to extradition for the first time.[39] *Trabelsi* held that the criteria prescribed by Article 3, per *Vinter,* were absolute.[40] As such, they protected against infringements of Article 3 when extraditing someone to a non-member State.[41] In that case, accordingly, they protected against the LWOP sentence *Trabelsi* could face in the USA. The *Trabelsi* judgment explained carefully what a reviewing court had to do:

> [T]he Court must inevitably assess the situation in the requesting country in terms of the requirements of Article 3. This does not, however, involve making the Convention an instrument governing the actions of States not Parties to it or requiring Contracting States to impose standards on such States. In so far as any liability under the Convention is or may be incurred, it is incurred by the extraditing Contracting State by reason of its having taken action which has the direct consequence of exposing an individual to proscribed ill-treatment.[42]

Trabelsi also provided clear authority for the proposition that the risk incurred by the applicant under Article 3 had to be assessed before it was confirmed that extradition would indeed happen—that is to say,

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[36] *Ibid.*

[37] *Ibid.*

[38] *Chahal v the United Kingdom* (1997) 23 EHRR 413, paras 80 et 81; *Saadi v Italy* [GC] (2009) 49 EHRR 30, para 138; *Daoudi v France,* Application no 19576/08, Judgment of 3 December 2009, para 64; *M.S. v Belgium*, Application no 50012/08, Judgment of 31 January 2012, paras 126–127.

[39] *Trabelsi v. Belgium* (2015) 60 EHRR 21.

[40] *Ibid*, para 120.

[41] For further explication of the key criteria for the implementation of life imprisonment in the context of extradition, including what a life sentenced prisoner would need to know at the start of a life sentence, see *Trabelsi*, *supra* note 39, paras 115 and 137.

[42] *Ibid*, para 119, internal references omitted.

the court had to assess the impact of the possible conviction of the applicant in the State seeking extradition. As the *Trabelsi* Court explained: "It is a matter of ensuring the effectiveness of the safeguard provided by Article 3 in view of the serious and irreparable nature of the alleged suffering risked."[43] By this reasoning, if a potential extraditee is to be protected from being treated in a way that infringes Article 3, the assessment of risk must precede extradition. Doing so afterward would be too late: the person would have left the jurisdiction of the extraditing State and, indeed, of the ECtHR.

The *Trabelsi* judgment was followed in 2019 by the German Federal Constitutional Court, which held that extradition to the USA should be refused if there was a possibility that an extraditee could be sentenced life imprisonment without a prospect of parole.[44] Recognition of *Trabelsi* by the apex court of a major European jurisdiction indicates that, had *Trabelsi* been the last word of the ECtHR on the matter, the clear effect would have been to demand from all requesting States assurances that, upon extradition, they would not impose whole life sentence sentences. Extraditing a person from a State party to the ECHR to somewhere where they could face a whole life sentence would have become illegal throughout Europe, and that would have been so whether the requesting State was party to the ECHR or not.

2.4 *Resistance, and the Reversal of Trabelsi*

Trabelsi was never accepted as binding authority in the UK. After *Trabelsi*, the UK government continued to support efforts by the US government to extradite people facing whole life sentences. In 2014, the matter of *Harkins* came before the English courts again (*Harkins 2*[45]), as Harkins sought to have the legality of his pending extradition reconsidered in the light of developments in ECtHR jurisprudence. At the time, the leading English case on extradition and life imprisonment was a 2008 decision (*Wellington*), in which the House of Lords, then the apex court in the United Kingdom, permitted extradition to the US state of Florida, even though the extraditee faced a mandatory sentence of LWOP if convicted.[46] The House of

[43] *Ibid*, para 120.

[44] BVerfG, BvR 1258/19, Decision of 4 December 2019.

[45] *R (Harkins) v Secretary of State for the Home Department* [2014] EWHC 3609 (Admin), [2015] 1 WLR 2975.

[46] *R (Wellington) v Secretary of State for the Home Department*, *supra* note 34.

Lords ruled unanimously that extradition should not be blocked in such a case, although the Law Lords differed in their reasons for reaching that conclusion.[47]

The initial question before the English high court in *Harkins 2* was whether the judgment of the Grand Chamber in *Vinter* changed ECHR law to such an extent that *Wellington* should be reconsidered. The English court declined, holding that *Vinter* had not significantly altered the law on life imprisonment. Before the court could deliver its judgment, however, the decision in *Trabelsi* was handed down. The *Harkins 2* court withheld judgment to consider the impact and upon further reflection dismissed *Trabelsi*. *Trabelsi*, the English court determined, was an outlier in ECtHR jurisprudence. Moreover, the court held, it was not bound by *Trabelsi*, which was decided by only a section of the ECtHR and did not involve the UK. Rather, the court considered itself bound by the view of the House of Lords in *Wellington* and the ECtHR's pre-*Vinter* decision in *Harkins and Edwards*, both of which held that Article 3 requirements should not be applied too strictly in extradition matters.[48] English courts followed the same approach in subsequent cases.[49]

The British government then took the unusual step of intervening before the ECtHR in a case to which it was not a party, *McCallum v Italy*.[50] In that case, the Italian government, despite its courts having

[47] Three Law Lords held that in extradition cases a relativist approach should be applied to Article 3 where it concerned not torture but inhuman or degrading treatment or punishment. Two others argued that although Article 3 as a whole set an absolute standard, as long as a life sentence was not totally irreducible, the potential mechanisms for reducing it should not be subject to close scrutiny in order to allow it. This latter view, as we have seen above, was supported by the ECtHR in *Harkins and Edwards*.

[48] Harkins took his case to ECHR again: *Harkins v United Kingdom* (2018) 66 EHRR SE5. However, the Grand Chamber concluded that the renewed application was not admissible as the facts had not changed since the ECtHR had decided it in 2012 in *Harkins and Edwards v. the United Kingdom*. On this technical ground, the earlier decision remained final, notwithstanding the subsequent development of the law in *Vinter* and *Murray*.

[49] *Hafeez v US* [2020] EWHC 155 (Admin), [2020] 1 WLR 1296; *Sanchez v US* [2020] EWHC 508 (Admin), [2020] ACD 51. See L Graham "Extradition, Life Sentences and the European Convention" (2020) 25 *Judicial Review* 228–234.

[50] *McCallum v Italy* (2023) 76 EHRR SE3. Art 36 of the ECHR enables the President of the Court to allow "any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings".

held that life imprisonment without a realistic prospect of release was unacceptable under domestic law,[51] was prepared to accede to an extradition request to the US state of Michigan on a charge of first degree murder, which upon conviction could have resulted in a mandatory LWOP sentence. After the Italian courts ruled McCallum could be extradited, she applied to the ECtHR to block extradition, arguing that it would infringe Article 3 per *Trabelsi*. Entering as amicus curiae, the UK submitted that extradition should be allowed, on the policy ground that denying extradition would undermine international cooperation in criminal matters and on the legal ground that *Trabelsi* was wrongly decided.

Shortly thereafter, the First Section confronted the matter of *Sanchez Sanchez v United Kingdom*, in which an applicant faced extradition to the USA on a federal charge of drug dealing for which, if extradited, tried, and convicted, the sentencing court would have discretion to impose LWOP.[52] The UK government advanced there the same arguments as it put forward before the First Section in *McCallum*, framing the issue of extradition and whole life sentences in such a way that propelled both cases to the Grand Chamber.[53]

The cases took quite different directions. In *McCallum*, the US informed Italy that prosecution authorities in Michigan had undertaken not to charge her with first degree murder if she were extradited; instead, they would charge her with murder in the second degree, which in Michigan does not carry a LWOP sentence.[54] The Grand Chamber persisted in hearing the case notwithstanding this development, but subsequently ruled that McCallum's application was "manifestly ill-founded",[55] as there was no risk of receiving a life

[51] Constitutional Court of Italy (204/1974), Judgment of 27 June 1974; Constitutional Court of Italy (264/1974), Judgment of 7 November 1974).

[52] *Sanchez Sanchez v United Kingdom*, *supra* note 8.

[53] The First Section responded to both challenges by relinquishing jurisdiction to the Grand Chamber as each raised a question the resolution of which "might have a result inconsistent with a judgment previously delivered by the Court" (Art 30 of the ECHR), and the Grand Chamber agreed to hear the two cases on the same day, 25 February 2022.

[54] *McCallum v Italy*, *supra* note 50, para 28. Following a conviction for murder in the second degree, the court in its discretion can impose a sentence ranging from a fixed term of a year in prison to life with parole to be considered after a period set by the court, which period may not exceed 30 years. *Ibid*, para 30.

[55] Art 35(3) of the ECHR requires that applications that are "manifestly ill-founded" must be declared inadmissible and rejected as required by Art 35(4) of the Convention.

sentence without parole. The *McCallum* decision, as such, is significant as an illustration of how undertakings to avoid LWOP sentences can allow extradition to proceed. By contrast, in *Sanchez Sanchez* the respondent government (the UK) was given no assurance by the USA that an LWOP sentence would not be imposed. Consequently, the Grand Chamber had to respond to the application, and in doing so directly confront the UK's challenge to *Trabelsi*.

III THE *SANCHEZ SANCHEZ* JUDGMENT AND ITS REPERCUSSIONS

The Grand Chamber begins the substantive part of its *Sanchez Sanchez* judgment by emphasising a basic human rights principle:

> Article 3 of the Convention, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible … even in the event of a public emergency threatening the life of the nation….Along those lines, the Grand Chamber recognized that *Vinter* required a review mechanism focused on rehabilitation, and that such a review mechanism had to allow "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".[56] The Court further highlighted the safeguards subsequently developed in *Murray v Netherlands*—namely, that people serving life sentences need to know at the beginning of their sentence what they have to do to be considered for release and that reasons should be provided for decisions not to release and the process safeguarded by judicial review.

Yet despite recognizing *Vinter* and *Murray*, and despite claiming the Article 3 requirements absolute—and despite underscoring that the obligation to cooperate in international criminal matters remains "subject to the same State's obligation to respect the absolute nature of the prohibition under Article 3 of the Convention"[57]—the ECtHR nevertheless determined that cases involving extradition are excep-

[56] *Vinter v United Kingdom*, *supra* note 2, para 119, quoted with approval in *Sanchez Sanchez v United Kingdo*m, *supra* note 8, para 81.

[57] *Ibid*, para 83. It underlined the importance of this protection in subsequent paragraphs (*Ibid*, para 86):

> The prospect that an individual may pose a serious threat to the community [in the requested State] if not returned does not reduce in any way the degree of

tional: the "full *Vinter and other* standards", the Court found, are "better suited to a purely domestic context" and, consequently, the need for them does not arise in the context of extradition.[58] "Contracting States", the Court noted, "are not to be held responsible under the Convention for deficiencies in the system of a third State when measured against the full *Vinter and Others* standard".[59]

Accordingly, the Grand Chamber held, a novel two-stage approach was required. " [A]t the first stage", the court explained, "it must be established whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, if extradited, and in the event of his conviction, there is a *real risk* that, a sentence of life imprisonment without parole would be imposed on him".[60] At the second stage, conditional upon satisfaction of the first, the court must assess if "there is a review mechanism in place allowing the domestic authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her behaviour or other relevant personal circumstances".[61]

Trabelsi applied neither of these approaches: it did not take the first step of considering whether there was a "real risk" the applicant would be sentenced to LWOP; and it "also examined, at the moment of extradition, whether the *Vinter and Other* criteria were satisfied in their entirety".[62] For these reasons, the Grand Chamber overruled *Trabelsi*, and then proceeded to apply its new two-step approach to the facts of the *Sanchez-Sanchez* case. Concluding unanimously, with respect to the first step, that there was no "real risk that the applicant would be sentenced to life without parole", the Court declined to consider as a second step the "review mechanism" to which the applicant could be subject if, contrary to the expectation of the court, he was sentenced to LWOP in the USA.

Footnote 57 continued
risk of ill-treatment that the person may be subjected to on return, and cannot therefore be balanced against it.

[58] *Ibid*, para 93. See *Ibid*, para 97: "[I]n an extradition case the question is not whether, at the time of the prisoner's extradition, sentences of life imprisonment in the requesting country are compatible with Article 3 of the Convention, by reference to all of the standards which apply to serving life prisoners in the Contracting States."

[59] *Ibid*, para 93.

[60] *Ibid* (emphasis added).

[61] *Ibid*.

[62] *Ibid*.

As discussed in what follows, the distinction the Grand Chamber has drawn between the first and second steps of review, and between the "substantive" and "procedural" protections provided by Article 3, is highly problematic, as are the Court's justifications for doing so. Indeed, in the immediate aftermath of the *Sanchez Sanchez* judgment, the Grand Chamber has been criticised for trying to work around its clearly established precedents of *Vinter* and *Murray* for political reasons—specifically, in order to placate the UK government, which had been highly critical of previous decisions restricting extradition.[63] This criticism echoes similar critiques of *Hutchinson v United Kingdom*,[64] which, in face of a sustained political attack in UK on the ECtHR as overly interventionist body, also sought to justify limiting the application of the *Vinter* and *Murray* standards to domestic decision making in England on the release of life sentenced prisoners.[65] Ironically, in *Sanchez Sanchez*, the Grand Chamber did not mention the controversial precedent it created in *Hutchinson*. Yet it nevertheless implemented a standard for extradition cases less rigorous than what *Vinter* and *Murray* require in domestic European cases.

The following sections analyse the freshly-minted, two-step approach the Grand Chamber developed in *Sanchez Sanchez*, drawing in particular from the first ECtHR case to apply the standard.[66] We begin by looking at the substance versus procedure distinction that the Court adopted as an overall approach. We then turn to each of the two steps the Court specifies, examining what they demand and the role they play in shaping expectations and outcomes in life-sentence extradition cases.

3.1 *The Substance/Procedure Distinction*

The ECtHR has long made it clear that life sentences may be imposed under Article 3 and that no incarcerated person has an absolute right

[63] P Arnell, "Extradition and the Regrettable Influence of Politics upon Law" *Verfassungsblog: On Matters Constitutional*. 17 November 2022, https://verfassungsblog.de/extradition-and-the-regrettable-influence-of-politics-upon-law/

[64] *Hutchinson v United Kingdom*, *supra* note 27.

[65] M Pettigrew, "Politics, power and parole in Strasbourg: dissociative judgement and differential treatment at the European Court of Human Rights"' (2018) 4 *International Comparative Jurisprudence*, 16–26; A Dyer, "Irreducible life sentences: what difference have the European Convention on Human Rights and the United Kingdom Human Rights Act made?" (2016) 16 *Human Rights Law Review*, 541–584.

[66] *Balahan v. Sweden* (Application no. 9839/22, Judgment of 29 June 2023).

to be released before the completion of their sentence. Put another way, the rights that Article 3 provides do not negate the life sentence but rather ensure it is implemented in a way that is not inhuman or degrading. With this understood, one recognises that the detailed requirements developed in *Vinter* and subsequent judgments of the ECtHR in "domestic" cases are not "merely procedural", as the Grand Chamber held in *Sanchez Sanchez*. Instead, those requirements about consideration of release are designed to ensure that life sentences are implemented in a way that gives "institutional hope" to the people serving them.[67] From that flows the requirement that incarcerated people must know at the beginning of their sentence what they have to do to improve their chance of release as well as the timing and form of the review process. This is why reasoned decisions are deemed so important. This is why ECtHR jurisprudence regards "compassionate release" as no release at all—for simply pushing someone out into the community at the end of their days is arguably inhumane treatment that denies their humanity as social beings. And this is why executive clemency by a head of state has been persistently rejected by the line of ECtHR judgements subsequent to *Vinter*—judgments the Grand Chamber ignored in *Sanchez Sanchez*.[68] In short, the aspects of *Vinter* and *Murray* that *Sanchez Sanchez* characterized as "mere procedure" are in fact the substance of the rule.[69]

The "full *Vinter and Other* standards" accordingly form a coherent package, built around a concept of human dignity guaranteed by Article 3. For people serving life sentences, this dignity would be undermined by not providing them with an opportunity for rehabilitation that, if grasped, could lead to their release. In *Sanchez Sanchez*, however, by sloughing off some of the standards designed to ensure dignity is not undermined, the Grand Chamber puts forward a

[67] C Seeds, "Hope and the life sentence" (2022) 62 *British Journal of Criminology* 234, 240–241. Seeds defines "institutional hope" as hope that oriented along an established path with a visible goal, often supported by an institutional apparatus, such as a legal right to review for release.

[68] See *T.P. and A.T. v. Hungary*, *supra* note 31; *Sándor Varga v Hungary*, *supra* note 31; *Matiošaitis v Lithuania*, *supra* note 32); *Petukhov v Ukraine no.2*, *supra* note 33.

[69] The suggestion that some of the *Vinter-Murray* criteria are "merely procedural" is also analytically flawed. In a long line of cases, concerning Articles 5 or 6 where the ECHR otherwise deals with due process, the ECtHR has chosen not to develop procedural standards for life imprisonment. Instead, it has integrated them into its interpretation of Article 3, knowing full well that that article sets absolute requirements.

reduced and deracinated test that exposes extraditees to inhuman and degrading treatment.[70] Indeed, keeping people serving LWOP in prison without a clear prospect of timely and systematic consideration for release is remarkably similar to keeping people awaiting their uncertain fate for many years on death row.[71]

The Grand Chamber offered several reasons, none convincing, for undermining its own Article 3-based safeguards in the case of prisoners facing extradition. First, the Court claimed that there is more uncertainty in what an extraditee faces by a life sentence in a non-member State than in a State party to the ECHR.[72] Superficially, one should recognize that some uncertainty will exist with all extradition requests, for evaluating the severity of the prospective punishment always requires making assumptions about how punishment will be implemented *if* the extradition goes ahead. The existence of uncertainty itself, therefore, hardly justifies the distinction between member and non-member States. This is particularly so with respect to the USA, where LWOP is oft-imposed and where the punishment has been subjected to more judicial and scholarly scrutiny than perhaps anywhere else in the world.[73] Information on LWOP sentencing in the United States is relatively accessible—arguably, more so than in some States party to the ECHR, such as Hungary, Lithuania and

[70] See *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 93; L Graham, ''Life sentences and article 3 ECHR in the extradition context: Sanchez-Sanchez v United Kingdom 2023 1 *European Human Rights Law Review* 40–47.

[71] Cf. *R v Bissonnette* 2022 SCC 23, where the Supreme Court of Canada held that ''the psychological consequences flowing from a sentence of imprisonment for life without a realistic possibility of parole are in some respects comparable to those experienced by inmates on death row, since only death will end their incarceration''. (para 97). The Court concluded that ''[e]ffects like these support the conclusion that a sentence of imprisonment for life without a realistic possibility of parole is degrading in nature and thus intrinsically incompatible with human dignity'' (*Ibid.*).

[72] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 93.

[73] On LWOP in the USA, see the periodic reports published by The Sentencing Project; see also, for example, C Seeds, *Death by Prison: The Emergence of Life without Parole and Perpetual Confinement* (Univ California Press 2022); M Vannier, *Normalizing Extreme Imprisonment: The Case of Life without Parole in California* (Oxford 2021); M Mauer and A Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (New Press 2018); C Appleton and B Grøver, ''The Pros and Cons of Life without Parole''. (2007) 47 *British Journal of Criminology*, 597–615; and the edited volume by C Ogletree and A Sarat, *Life without Parole: America's New Death Penalty?* (NYU Press 2012).

Ukraine, where the ECtHR has found release procedures for life sentences do not meet the full Article 3 standards.[74]

Second, the Grand Chamber urged that applying the full panoply of *Vinter* protections would allow potential extraditees to escape prosecution with impunity. In the Court's words:

> [I]n the extradition context the effect of finding a violation of Article 3 would be that a person against whom serious charges have been brought would never stand trial, unless he or she could be prosecuted in the requested State, or the requesting State could provide the assurances necessary to facilitate extradition.[75]

It could hamper international cooperation in criminal matters, the Grand Chamber suggests, by creating "safe havens" for those charged with the most serious criminal offences.[76] This fear is greatly overstated. As we have seen in the case of the death penalty after *Soering*, demanding guarantees has not undermined international cooperation. There is no basis for believing that similar guarantees cannot be given to ensure a potential extraditee will not face a whole life sentence. On the contrary, as noted above, the assurances given at a late stage in the case of *McCallum v Italy* are a recent example of a guarantee of no LWOP. A similar guarantee could have been sought in *Sanchez Sanchez*; and, if given by the US government, it would have allowed the prosecution to proceed without risk of impunity or infringement of Article 3.[77]

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[74] See text at notes 30–33 and note 68 above. Significant in this regard is the joint concurring opinion of judges Lemmens and Spano in *Matiošaitis v Lithuania*, *supra* note 32, which notes that analysis of the precise treatment of an individual case is not necessary if enough is known about the structure and operation of a release system to apply the Article 3 standards in a particular State.

[75] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 95.

[76] *Ibid.*

[77] In the *McCallum* decision, the Grand Chamber confirmed the view that assurances given by way of diplomatic notes were "a standard means for the requesting State to provide any assurances which the requested State considers necessary for its consent to extradition", that they "carry a presumption of good faith" which should be applied in extradition cases "to a requesting State [such as the USA] which has a long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with contracting States". *McCallum v Italy*, *supra* note 50, para 51. This presumption of good faith, the Grand Chamber added, was reinforced by the duty of good faith performance of treaty obligations contained in Article 26 of the Vienna Convention on the Law of Treaties, which would prevent the reinstatement of the original, LWOP-bearing

Third, in *Sanchez Sanchez* and elsewhere, the Grand Chamber warns that the ECHR should not be interpreted to require non-party States to introduce "procedural safeguards", as this could be viewed as extending the jurisdiction of the Convention beyond its borders.[78] As argued above, the distinction between substantive and procedural standards does not stand up, for the standards combine to offer the protection against inhuman or degrading treatment that Article 3 requires. Further, the standards themselves are more flexible than *Sanchez Sanchez* lets on—flexible enough to allow even States party to the Convention a wide margin of appreciation (the standards, for example, allow release decisions to be made by courts or administrators, as long as sufficient safeguards are in place). Requesting States not party to the Convention enjoy the same flexibility. Non-party States are not required to administer *all* their life sentences in a way that meets Article 3, only those applied to extraditees. By way of parallel, consider that the prohibition on imposing the death penalty on extraditees did not lead to a requirement that the USA or other countries reject capital punishment in instances where extradition was not involved. Again, there is inconsistency between the decision in *Sanchez Sanchez* and the mandate in *Soering*. *Soering* illustrates the full standards could be applied in extradition cases. Failure to do so encourages requested States to take the easy route in life sentencing

Footnote 77 continued
charges. Consequently, if convicted, the Grand Chamber concluded, following extradition McCallum would face at most the prospect of life imprisonment with eligibility for parole. *McCallum v Italy*, *supra* note 50, para 51. It is clear that the Grand Chamber saw diplomatic assurances as an effective way of keeping extradition going, while excluding LWOP sentences.Such assurances, given by the US government, may not prove to be effective, however. See MC Bassiouni, I*nternational Extradition: United States Law and Practice* (Oxford University Press, 2014), for examples of case where prosecutors or courts in the USA have reneged, or sought to renege, on assurances that an extraditee will not be sentenced life imprisonment or more specifically life imprisonment without a prospect of parole. Bassiouni also notes that a distinction can be drawn in US practice between the application of the principle of speciality in extradition law, which as a legal principle applied by the courts, and an assurance about punishment which binds only the executive as represented by the prosecution but not the courts directly. Whether this distinction will play a role in McCallum's case when it goes to trial in Michigan is not clear. At the time of writing, there was no final ruling on whether the McCallum will be tried on a charge of second degree murder as US government had undertaken, or whether the charge of first degree murder would be reinstated.

[78] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 96.

cases and not apply the "absolute" protections of Article 3 to potential extraditees.

The significance of distinguishing between procedural and substantive rules is well illustrated in the 2023 case of *Balahan v Sweden*, where the complainant argued that if a Court were to convict him of the charges on which extradition was sought, under California's notorious three strikes law the Court could set a minimum period of 61 years before his release could be considered, which would make his sentence irreducible de facto. In evaluating this argument, the First Section recognised that in cases of life sentences imposed in member states of the ECHR, the ECtHR has consistently held that life sentences not providing consideration for release until 40 years are not reducible and therefore inhuman and degrading in Article 3 terms (para 57). However, "in the extradition context", the First Section opined, the time period before consideration of release was a mere *procedural* issue, examining the details of which may be difficult in non-member states and is therefore "not required" (para 58). Judge Wotyczek offered a different perspective in his dissenting opinion, opposing extradition on the ground that a minimum period of 61 years constitutes a form of life imprisonment that is, *substantively*, irreducible.

3.2 *The First Step*

In the Court's view, determining whether the sentence faced is in fact contrary to Article 3 in an extradition case will only become necessary if the applicant can first adduce evidence "capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a *real risk* of being subjected to treatment contrary to Article 3".[79] The first step as defined in *Sanchez Sanchez*, in other words, is to determine whether there is a "real risk" of the applicant being subject to a sentence that is "substantively" contrary to Article 3. To discern this, the Grand Chamber indicated, "a complex risk assessment is called for, a tentative prognosis that will inevitably be characterized by a very different level of uncertainty when compared to the domestic context."[80]

In certain cases, such as where LWOP is mandatory upon conviction, it may be relatively simple for an applicant to show the risk

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[79] *Ibid*, para 87, emphasis added. See also paras 95 and 97.

[80] *Ibid*, para 92.

they face is "real". But when the potential sentence is merely discretionary, as it was for *Sanchez Sanchez*, the issue is more complicated. In *Sanchez Sanchez*, a UK District judge had conducted an inquiry to which the US government was also a party. She concluded there was a "real possibility", based on the US Federal Sentencing Guidelines, that Sanchez Sanchez could receive an LWOP sentence if extradited and convicted.[81] Yet according to the Grand Chamber, upon examining the evidence itself, this "real possibility" did not rise to the level of "real risk". The Grand Chamber provided neither an explanation of why the "real possibility" identified by the UK judge did not pose a "real risk" nor any words on the distinction between the two.[82] Thus, leaving open the question: what makes a risk "real"?[83]

In 2023, the Grand Chamber's standard on the first step has been applied in three further decisions of the sections of the ECtHR. Most significant, in *Balahan v Sweden* the First Section considered whether, if the complainant were extradited to California, there was a real risk that he could face a life sentence that was de facto irreducible. Here, too, the Court's decision turned on the determination that the complainant had not demonstrated a real risk of having a life sentence imposed on him.[84] The Court therefore left open the "second step"

[81] *Ibid*, para 102.

[82] It did so on the basis of its holding that:If the applicant is still in the Contracting State, the material point in time for the assessment must be that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken. (*Ibid*, para 88).

[83] In reality, adducing evidence of some degree of risk is unproblematic in most extradition cases. The extradition principle of specialty requires that a person being extradited face a particular charge. A quick perusal of the applicable penal code will usually suffice to determine whether upon conviction of such a charge a sentencing court would have the power to impose a sentence that could infringe Article 3. Risk can be eliminated entirely, as in *McCallum v Italy* (*supra* note 50), if the requesting State provides a guarantee that, if extradited, the applicant will not receive a sentence such as LWOP.

[84] In *Hafeez v United Kingdom* (Application no. 14198/20, Decision of 28 March 2023), the Fourth Section of the ECtHR unanimously declared inadmissible a case in which the facts were substantially similar to those in *Sanchez Sanchez* – the complainant's extradition was sought to enable him to face a serious drug charge in the Federal system for which LWOP could be imposed but the Court found that he had not demonstrated that there was a real risk of this sentence being imposed.See also *Carvajal Barrios v Spai*n (Application no. 13869/22, Decision of 4 July 2023). As in *Hafeez*, the complaint was declared inadmissible. Given the different facts in the

question of whether the life sentence with a very long minimum period to be served before release should be regarded for extradition purposes as contrary to Article 3. The Court's determination turned in no small part on the discretion held by the prosecutor and the sentencing court, which made the expected result of a prosecution difficult to predict' (para 62). That difficulty is amplified by the difficulty of assessing "procedural safeguards in the requesting State" (para 58). In a powerful dissenting opinion, Judge Wojtyczek criticized the majority's interpretation of discretion. The majority, Judge Wojtyczek argued, wrongly saw the discretion that a prosecutor would have to seek a 61-year minimum sentence and that the Californian court would have to impose such a sentence as an advantage to the defendant. In his view, however, it was the discretionary nature of the decision that made the risk for the complainant very real. Rather than an advantage to the defendant, in other words, discretion was more accurately seen as "a threat". He further opined that: "Real risk begins at a relatively low level of probability of an unfavourable outcome" (para 5).[85]

The disagreement among members of the court in *Balahan* evinces the possibility of ideological differences as to what discretion indicates about the risk of an irreducible life sentence upon extradition. Two polar perspectives are reflected: on the one hand, per the majority, discretion undercuts real risk; on the other hand, per the dissent, discretion establishes real risk. As demonstrated by the diverging opinions in *Balahan*, these perspectives taken on discretion and the related risk may be rather extreme. Of course, interpretations will depend in significant part on the evidence (or relative lack thereof) in a given case. But as *Balahan* shows, there is a potential that the first step, rather than involving the application of a standard,

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Footnote 84 continued
Carvajal case, it would have been appropriate for the court to admit the complaint and consider the application of the *Sanchez Sanchez* standard to the facts at hand. As it stands, the Carvajal decision applies the first step as little more than a rubber stamp that would deny the possibility of meeting the requirements of the first step under any circumstances.

[85] At the time of writing the *Balahan* judgment was not final, thus leaving open a possible approach to the Grand Chamber. A possible indication that this was envisaged is that the First Section decided unanimously, "to continue to indicate to the Government [of Sweden] that it is desirable in the interests of the proper conduct of the proceedings not to extradite the applicant until such time as the present judgment becomes final or until further notice" (para 71).

appears to invoke an ideological battle over what are, in essence, different rules.

It bears note that the significance of how the court interprets discretion is related to a broader issue of how pre-trial decision points (or inflection points) impact the foreseeable risk of an irreducible sentence. The majority in *Balahan*, as discussed above, posed discretion as diluting risk. In *Sanchez Sanchez*, citing a US Department of Justice letter to the UK, the Court similarly emphasized many ways in which a defendant might escape a life sentence: if reaching a plea arrangement, if acquitted, if presenting convincing mitigating evidence to the sentencing court, if the judge exercises discretion not to impose a life sentence, if successful on appeal, and so on.[86] One might expect that if such contingencies reduce the real risk of an LWOP sentence, they also would reduce risk in the case a death sentence—for there are even more procedural opportunities for diversion in capital cases, given the US Supreme Court's complex Eighth Amendment jurisprudence. Indeed, a prominent study of death sentences at the beginning of the millennium found that two thirds of all death sentences imposed across states in the USA were reversed on appeal.[87] Yet, where extradition could potentially lead to a sentence of death, the ECtHR never considers such factors; rather, it requires States party to the ECHR to refuse extradition because *any* risk of capital punishment would infringe Article 3. Therefore, by considering pre-trial and trial contingencies as an element mitigating risk in potential LWOP cases, the Grand Chamber has developed a standard more lenient than that applicable in death penalty cases. Such a double standard visibly undermines the claim that the Grand Chamber continues to recognise the "absolute standard of protection" derived from Article 3 in cases involving LWOP.

Part of the reason that ideological disagreements over issues such as the relationship between discretion and risk matter so much is that the foundation of the first step lies in the assumption that detailed information about the procedural workings of non-member legal systems will be hard to come by. Accordingly, it may be reasonable to expect that debates over how to interpret discretion will often take place at a relatively abstract level. Moreover, the vagueness of the "real risk" standard indicates the tension that now exists between the

[86] *Ibid*, paras 64 and 108.

[87] JS Liebman, J Fagan and V West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, Columbia Law School Public Law Research Paper No.15 (2000). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1219.

adjudications of extradition (per *Sanchez Sanchez*) and non-extradition cases (per *Vinter* and *Murray*). *Vinter* prizes detail. And one might reasonably question why extradition cases ought not too—indeed, while the Grand Chamber in *Sanchez Sanchez* offers reasons why detail is less an issue in extradition, there are reasons unique to extradition that make detail critical. One principle inherent in extradition matters is that of abiding by a neighbouring state's own reasonable interpretation of its law and practice, out of respect for autonomy. Another principle of extradition is that of specialty, which provides that persons who are extradited can only be prosecuted and punished for the offences for which their extradition was sought.[88] Both suggest detail should be equally if not more important in extradition cases.

Despite a standard not requiring detailed information about local practice, it would seem, after the decisions in *Sanchez Sanchez* and *Balahan*, that the more information a litigant can show about local practice—and, in particular, about the exercise of discretion by prosecutors and sentencing courts—the better off their claim of real risk may be. And yet, the *Sanchez Sanchez* opinion also highlights an issue of interpretation—a tendency of a court to favour the general over the specific—that may confront all litigants: the Grand Chamber's interpretation of "real risk" in *Sanchez Sanchez* gives attention, even priority, to general statistics over available information that specifically pertains to Sanchez Sanchez's charge. Doing so diluted the risk that LWOP posed to the applicant in that case.[89]

[88] See Art 14 of the UN Model Treaty on Extradition (n6); CM Sussman, "Not My Cup of Special-Tea: An Extradited Defendant's Standing to Challenge American Prosecution under the Specialty Doctrine" 2022 *U Chi L Rev Online* 1.

[89] For assessing the risk of receiving a life sentence, the relevant universe is not all cases, but cases with similar factors as the applicant. When one considers the relevant factors in Sanchez Sanchez's case, not even his co-conspirators in the drug trafficking case stand on precisely the same footing, as neither was charged with conduct that led to death as Sanchez Sanchez was. Yet the Court consistently focused more generally, emphasizing for example that life sentences in the federal system are "rare" because only 0.4 percent of all people sentenced in 2013 were sentenced to life (all life sentences in the federal system are without parole). Yet of those, 41.8 percent were for drug trafficking cases in which death or serious bodily injury resulted (*Ibid*, para 63), Sanchez Sanchez's charge. Further, the Court noted, "a life sentence is rare in drug cases, having been imposed in less than one-third of one percent of all drug trafficking cases that year" (*Ibid*, para 63, 104). Again, the more relevant statistic would be how often life is imposed in drug cases *in which death or serious bodily injury results*. A similar point can be made about data on downward departures from the Sentencing Guidelines, which the federal court trying Sanchez Sanchez could

In sum, (i) eschewing detail for generality, (ii) taking pre-trial inflection points to be reductions in risk as a general matter; and (iii) more specifically, identifying prosecutorial and judicial discretion as advantages (rather than threats) to a defendant who seeks to avoid LWOP—each of these are interpretive choices that diminish the apparent "real risk" of an LWOP sentence. And they are matters, which all litigants challenging extradition to an irreducible life sentence will confront with the first step of the *Sanchez Sanchez* standard, that are troublingly open ended.

3.3 *The Second Step*

Per the *Sanchez Sanchez* judgment, the purpose of the second step is to "focus on the substantive guarantee which is the essence of the *Vinter and Others* case-law and is readily transposable from the domestic to the extradition context".[90] This means that the sending State must make a determination "prior to authorising extradition that there exists in the requesting state a mechanism of sentence review which allows the competent authorities there 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".[91] Unfortunately, the Court addressed the second step in *Sanchez Sanchez* only to say that while an irreducible life sentence is unacceptable, the procedures by which release from a life sentence should be considered are not so strict in extradition cases as in cases prosecuted in States party to the Convention. Procedural safeguards in the legal system of the requesting State, the Grand Chamber adds, are "not a prerequisite for compliance by the sending Contracting State with Article 3".[92]

The Court did not adjudicate the second step on the merits in *Sanchez Sanchez*, but it is likely to be crucial in future cases where the

Footnote 89 continued
apply (*Ibid*, para 64). Downward departures from the federal sentencing guidelines are frequent as a general matter, the Court emphasized; but, as the Grand Chamber later points out (*Ibid*, para 71), judges are found to follow the Sentencing Guidelines more often in life cases (indeed, the Guidelines were followed in 81% of the cases where life sentences were imposed).

[90] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 96.

[91] *Ibid*.

[92] *Ibid*.

definition of post-sentencing procedural safeguards (e.g., length of time before review, mechanism of review) is at issue.[93] Moreover, the Grand Chamber made it clear that for purposes of this step, too, it was overruling the *Trabelsi* judgment that had applied the *Vinter* criteria "in their entirety".[94] It would therefore be naïve to dismiss what the Grand Chamber has to say about the second step as mere obiter dicta. The claims made and the evidence presented in *Sanchez Sanchez* regarding the law and practice of the requesting State are worth examining.

An examination of the claims and evidence presented in *Sanchez Sanchez* shows that the respondent State—the UK—failed to present accurate evidence about the requesting State—the US federal system—and in fact presented evidence that does not portray the law in a way consistent with the federal system's own interpretation of its law. In arguing that there is an effective release mechanism in the US federal system, the UK failed to recognize the federal system's own definition of LWOP as a perpetual confinement. More specifically, the UK failed to delve into the US federal law and practice to recognise that compassionate release and clemency are extraordinary remedies, which may not be sufficient to meet even the diminished standard of review now prescribed for the second step. The following discussion focuses on the specific claims and evidence presented about the US federal system in *Sanchez Sanchez*, but also draws from this discussion more general points about the second step.

3.3.1 *The meaning and practice of LWOP in the USA*

The US Supreme Court interprets punishments imposed in state and federal courts in light of the US Constitution. The Court's decisions are binding on state and federal courts nationwide, and its interpretation of law provides operative definitions for lower courts and legal actors. Perhaps the strongest evidence that LWOP is an irreducible sentence in the USA at present comes from pronouncements of the US Supreme Court concerning this punishment. The Court has recognized the severity of life sentences that deny any possibility of

[93] Where, for example, an applicant, on extradition, faces a charge carrying a mandatory LWOP sentence, the "real risk" requirement of the preliminary step will easily be met. Such pure forms of irreducible life imprisonment, as Van Zyl Smit and Appleton, *supra* note 1, p. 41, note in their analysis of different types of life imprisonment, are very rare worldwide.

[94] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 98.

parole. These decisions begin with *Solem v Helm* in 1983[95] and *Harmelin v Michigan* in 1991[96] and continue to the more recent line of cases that restrict the use of LWOP sentences on people who committed the crime as children under the age of 18 years. The US Supreme Court's standing interpretation of LWOP is set forth in the following language from the first of those cases in 2010, *Graham v Florida*:

> As for the punishment, life without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability, yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The state does not execute the offender sentenced to life without parole, but the state alters the offender's life by *a forfeiture that is irrevocable*. It deprives the convict of the most basic liberties *without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence*. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.[97]

The italicized language in the passage above mirrors what the ECtHR defined as an unacceptable life sentence in *Vinter*. Since *Graham*, the US Supreme Court has considered a trio of cases involving LWOP sentences imposed on juveniles,[98] but its interpretation and understanding of the punishment has not changed; and that interpretation carries to US states and the federal system.

These jurisprudential statements about what one reasonably expects from LWOP in the USA are reinforced by empirical evidence pertaining specifically to the federal system, the jurisdiction at issue in *Sanchez Sanchez*. The Grand Chamber in *Sanchez Sanchez* noted, following its earlier decision in *Murray*, that statistical information may be relevant in determining whether a life sentence is in fact reducible.[99] A report by the United States Sentencing Commission (USSC) upon which the ECtHR relied in *Sanchez Sanchez* indicates

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[95] *Solem v Helm*, 463 US 277 (1983).

[96] *Harmelin v Michigan,* 501 US 957 (1991).

[97] *Graham v Florida*, 560 US 48 at 69–70 (emphasis added, internal references removed).

[98] *Miller v Alabama*, 567 US 460 (2012); *Montgomery v Louisiana*, 577 US 190 (2016); *Jones v Mississippi* 593 US ___ (2021).

[99] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 82.

that releases from life sentences in the federal system (all of which are "without parole") are vanishingly rare.[100] More than implicit is the fact that a "life" sentence in the federal system is "likely to extend to the death of the offender". These life sentences, in other words, mean death in prison, and as such are distinctly severe. The USSC report makes this clear in closing: "While most federal prisoners will be released from prison eventually, a small portion of federal offenders will spend the rest of their lives there".[101] It goes on to explain that: "While these [LWOP] sentences are imposed on only a small portion of the federal offenders sentenced each year, the impact these sentences have on the lives of the offenders in those cases sets them apart from all other sentences imposed in federal cases".[102]

In sum, in the USA over the past three-plus decades, the certainty of LWOP being a death in prison sentence has been such that the US Supreme Court, and by extension state courts and lower federal courts, treat LWOP as a sentence that on its face is more severe than all other punishments save the death penalty. As one might expect, in this light, claims like those the UK raised in *Sanchez Sanchez*, suggesting that clemency or compassionate release mechanisms offer a meaningful possibility of release, are fanciful.

3.3.2 *Compassionate release*

What amounts to "release"? This is a substantive question of primary importance that begs yet another: if someone succeeds in advancing the "extraordinary and compelling reasons" that US law requires for "compassionate release" does this amount to "release"? In *Vinter*, the Grand Chamber confirmed that merely allowing a terminally ill person to spend their last days in the community was not "release" at all. Further, the US Sentencing Commission defines those "extraordinary and compelling reasons" to encompass terminal illness and related circumstances that would not be regarded as "release" under the *Vinter* test.[103] This interpretation is reinforced by the legislative provision in the US federal system that rehabilitation of a prisoner

[100] GR Schmitt and HJ Konfrst, *Life Sentences in the Federal System* (Washington, DC: United States Sentencing Commission, 2015).

[101] *Ibid* at 19.

[102] *Ibid.*

[103] United States Sentencing Commission, *Guidelines Manual*, §1B1.13 (Nov. 2021).

alone shall not be considered a reason justifying compassionate release.[104]

Indeed, as the Grand Chamber correctly recognizes in *Sanchez Sanchez*, compassionate release is an extraordinary remedy in the US federal system.[105] And while the Grand Chamber did not decide the question of whether compassionate release as practiced in the US federal system met the reduced standards of the second step, one should look critically at the evidence and argument presented. When one does, it is clear that the respondent's characterization of compassionate release practice in the US federal system is inconsistent with the US system's own interpretation of its practice.

The British government argued compassionate release is more likely in the federal system following the passage of the First Step Act in 2018. With the First Step Act, Congress amended federal law to allow individuals in prison to file for compassionate release in federal court.[106] The Act did not change the substantive meaning of compassionate release; rather, it was designed to facilitate applications by prisoners for such "release". Available data published by the US Sentencing Commission in March 2022 on compassionate release grants since the First Step Act was not presented to and not considered by the Court. The March 2022 report shows in federal jurisdictions an upswing in "compassionate release" that tracks the COVID-19 pandemic.[107] The upswing, in other words, both begins and ends with the pandemic. Since the pandemic, the federal system's own data show, the impact of the First Step Act has been limited as compassionate release grants have gradually declined to a level on slightly above that prior to the Act.[108] Compassionate release remains an extraordinary remedy in the US federal system despite the First Step Act.

[104] Title 28 U.S.C. § 994(t).

[105] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 59.

[106] Title 18 U.S.C. § 3852(c).

[107] United States Sentencing Commission, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic (March 2022). The rate of compassionate release grants across the US federal system, moreover, varies significantly based on the Circuit in which the motion for it to be applied is presented.

[108] United States Sentencing Commission, Compassionate Release Data Report: Fiscal Years 2020 to 2022 (December 2022). While the grant rate has dropped to slightly above that prior to the Act, the number of motions filed remains much higher, although less that during the COVID-19 pandemic. *Ibid* at Table 1.

3.3.3 *Clemency*

If one closely examines the post-*Vinter* European jurisprudence on clemency regimes by heads of state in Europe—something considered above (and which the *Sanchez Sanchez* judgment conspicuously fails to do)—it is clear that executive decisions on release of prisoners serving whole life sentences presents a general problem under Article 3. Presidential decision-making may not be effective in coming to substantive conclusions about whether a prisoner should be released because it is inherently not suited to determining whether prisoners serving whole life sentences have changed sufficiently to render their continued detention impossible to justify on legitimate penological grounds. Under the narrow test the Grand Chamber has now set, however, procedural details of how the clemency power operates need not be closely scrutinised. Yet it takes careful examination to determine whether, in practice as well as in law, clemency in a given jurisdiction is a genuine release mechanism that effectively allows "the competent 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".[109]

Research in the US has shown, historically, that powers to commute the sentences of prisoners serving life sentences without parole were used systematically in some states.[110] At least since the early 1990s,[111] however, the US Supreme Court has simply assumed the different outcomes of life sentences based on the distinction between parole or no parole—the Court has assumed, in other words, that clemency is an unexpected, extraordinary remedy. In the contemporary USA, this tends to work because governors of US states in recent decades are almost sure not to grant clemency to incarcerated people serving LWOP—to the point that common understanding, among criminal justice system actors as among the public, is that LWOP means you die in prison.[112]

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[109] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 96.

[110] See, for example, Seeds, *supra* note 73, discussing Pennsylvania; B Foster, "Pardons and Politics: How It All Went Wrong", *The Angolit*e, January/February (1988), discussing Louisiana.

[111] See in particular the decision of the US Supreme Court in *Harmelin v Michigan*, *supra* note 96.

[112] The recent trend in states such as California of Governors to grant clemency on occasion to a few select people serving LWOP does not change the overall landscape in which commutation is an extraordinary event.

In the federal system, the power to grant clemency to all prisoners, including those serving LWOP sentences, falls with the President of the USA. Federal commutation of LWOP sentences was very rare before the Obama administration, with only a single commutation between 1990 and 2013. The Obama Administration, however, put commutation to use more regularly.[113] Focused on LWOP sentences for non-violent drug crimes, the Obama Administration commuted nearly 400 LWOP sentences in eight years; and the Trump Administration subsequently granted clemency to 17 federal prisoners convicted of drug crimes and serving LWOP. Critically, however, for someone in Sanchez Sanchez's position as well as for State's and courts considering the potential that Sanchez Sanchez would be subject to an LWOP sentence upon extradition, the focus in the Obama and Trump commutations alike was on *non-violent drug crimes*.[114] Even recognizing that the cases granted commutation most often in the federal system are drug conspiracy cases, the percentage of applicants that receive commutation in cases where death resulted is miniscule.[115]

There is something to be said for clemency as an avenue of criminal justice reform.[116] But the fact remains that clemency in the USA—including the federal system—is an extraordinary remedy, not a dependable one.[117]

[113] ER Collins, "Clemency and the Administration of Hope" (2017) 29 *Federal Sentencing Reporter* 263–266.

[114] The preceding data is drawn from D Pascoe, "Worthless Checks? Clemency, Compassionate Release, and the Finality of Life Without Parole" (2024) 118 *Northwestern Law Review* forthcoming. Only one of the Trump grants involved a death during the crime of conviction. *Ibid.*

[115] For a person currently facing extradition, statistics pertaining to the current presidential administration, that of Joseph R. Biden, may be the most significant. At present, over 14,000 petitions for commutation are pending before President Biden (https://www.justice.gov/pardon/clemency-statistics). His administration has re ceived between 2900 and 3700 new petitions per year since taking office in January 2021. To date, he has granted 79 petitions for commutation and closed 3292 petitions without action. President Biden, in other words, has granted 79 of approximately 14,000 petitions pending before him. (https://www.justice.gov/pardon/commutations-granted-president-joseph-biden-2021-present).

[116] See M Osler, "The Role of Clemency in Criminal Justice Reform, 2022" (2022) 34(4) *Federal Sentencing Reporter* 230–232.

[117] RE Barkow, "Clemency and Presidential Administration of Criminal Law" (2015) 90 *New York University Law Review* 802–869.

IV THE WAY FORWARD

In *Sanchez Sanchez*, the Grand Chamber emphasised that the prohibition of Article 3 ill treatment remains absolute. In this regard, the Court "does not consider that any distinction can be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context".[118] Notwithstanding this protestation, the overall approach to LWOP adopted in the *Sanchez Sanchez* judgment significantly weakens the protection offered to persons facing the risk of extradition. One cannot help but conclude that the Grand Chamber went out of its way to accommodate the UK and the USA by allowing extradition, even if it could result in a life sentence from which the extraditee would have little or no realistic prospect of release. Moreover, as we have shown, the two-step standard that the judgment prescribes makes it even harder for applicants to make a case to prevent extradition on the grounds that an LWOP sentence will infringe their Article 3 rights.

The Court has thus undermined the protection Article 3 offers to extraditees while nevertheless paying lip service. More specifically, in light of the cases applying the standard to date, it appears that the first step inquiry—into whether a complainant identifies circumstances in which there is a real risk of receiving an irreducible life sentence—is so strict that it may never be satisfied. The principle underlying the first step is that local procedures relevant to the prosecution and imposition of sentence in non-member States are too complex to dissect in ECtHR proceedings. Yet, given the decisions to date, it appears that specific evidence of local procedures is expected to sustain a finding of a "real risk". This contradiction between the logic of the rule and the practical demands of the court threatens to render the first step both incoherent and arguably unfair. The Grand Chamber should consider the shortcomings of the "real risk" test as it stands. In the meantime, litigants are counselled to present as much detail as they can possibly obtain regarding the history and current practices of prosecution and sentencing in the local jurisdiction.

The second step of the *Sanchez Sanchez* standard for extradition to non-member States of persons facing life sentences has not been applied in practice. But an analysis of the evidence presented in *Sanchez Sanchez* and the court's dicta on the second step in that case indicate some possible pitfalls in future applications. In particular,

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[118] *Sanchez Sanchez v United Kingdom*, *supra* note 8, para 96.

courts should be mindful to give great weight to a foreign jurisdiction's own interpretation of its law, which falls in line too with underlying principles of extradition. As we saw with the consideration of the US federal jurisdiction in *Sanchez Sanchez*, compassionate release and clemency—both identified as extraordinary remedies by the local jurisdiction—were wrongly identified by the respondent as procedures routinely providing a reasonable prospect of release.

In addition to the emphasis on accuracy and specificity noted above, requested States should ask requesting States, such as the USA, to give diplomatic assurances that LWOP will not be imposed. They should recognise that States sometimes give assurances that, intentionally or unintentionally, they do not implement,[119] and therefore also use diplomatic channels to ensure that such assurances are put into practice. Requested states may also indicate that they would be less than keen to support extradition hearings in their own jurisdictions without cast-iron guarantees that assurances will be honoured.[120]

International cooperation in criminal matters provides important opportunities for shaping what forms of life imprisonment will be

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[119] As Bassiouni (note 77, p. 612) explains: "As assurances are given by government representatives, there may be cases where the government official is under instruction by his/her superiors to make statements that the government does not intend to honor, and sometimes the government official or his/her superior may be acting without sufficient authority from senior decision-makers".

[120] There are also wider indications, in the UN Model Treaty on Extradition and elsewhere, that countries may introduce treaty provisions allowing party States to refuse extradition if it could lead to life imprisonment of a kind that they find unacceptable on human rights grounds. See the footnote to art 4(d) of the UN Model Treaty on Extradition. Portugal, for example, has already signalled, in a reservation to the 1996 European Convention on Extradition, that it would allow extradition for an offence punishable by a life sentence *only* if a requesting State gave assurances that it would encourage all measures of clemency to which the extraditee might be entitled. 1996 European Convention on Extradition OJ C 313 of 23 June 1996; IH Pinto, "Punishment in Portuguese Criminal Law: A Penal System without Life Imprisonment" in D van Zyl Smit and C Appleton, *Life Imprisonment and Human Rights* (Hart 2016) 289. A further example is to be found in the European Arrest Warrant (EAW), a simplified form of mandatory extradition that operates within the European Union. A requested State may refuse to execute an arrest warrant issued under the EAW, if the person who is to be transferred in terms of it could face a life sentence without a prospect of release for longer than 20 years. Art 5.2 of the European Union Council Framework Decision of 13 June 2002, on the European Arrest Warrant and Surrender Procedures between Member States, 2002/584/JHA. By threatening to invoke this provision a requested State can assert pressure on the requesting State to reform this aspect of its life imprisonment regime.

regarded as acceptable. States that fully accept the absolute prohibition of inhuman and degrading treatment as a universal human rights standard that should apply also beyond Europe can contribute to its worldwide enforcement by setting principled requirements in extradition treaties for the forms of life imprisonment that persons whose extradition is sought might face. Such requirements should allow standards to develop beyond the trimming in which the Grand Chamber of the ECtHR indulged in the *Sanchez Sanchez* ruling.

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