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EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

Prison standards in extradition matters

Discussion paper by Erik Verbert (Belgium)

1. General consideration: prison conditions as a potential ground for refusal under the aegis of the fundamental rights clause

Fundamental rights constitute a horizontal condition to extradition. The establishment of a serious risk of a (flagrant) violation of one or more fundamental rights or the sufficient indication of a past violation that may affect the person sought's situation in the requesting state must lead to the refusal of the extradition.

The prison conditions in the requesting State may come into play when these conditions or the expected conditions are or are allegedly of such a kind that they can be considered by themselves as a violation of article 3 ECHR.

The majority of the case law of the ECtHR that deals with prison conditions as an *established violation* of article 3 and not so much as a serious risk to a (future) violation of article 3. Most cases deal with domestic situations, i.e. persons that have spent pre-trial detention or post-trial detention or other types of deprivation of liberty such as detention for the purpose of expulsion or police arrest in appalling conditions. In most cases specific aspects of the detention were under scrutiny such as (the lack of) adequate medical treatment or the lack of adequate access to outside communication and / or visits. With regard to mentally ill offenders a lack of adequate psychiatric treatment was scrutinized, for instance in a recent series of judgments re. Belgium.

In an international, esp. extradition context the *Soering v. UK* judgment (1989) remains the very basis for all ECtHR case law re. fundamental rights and extradition. In particular, the Court ruled that an extradition to the US for an offence which is punishable by the death penalty establishes a serious risk to expose the person sought (Soering) to the so-called death row phenomenon. While it were not as such the material conditions of the detention (in death row) that were considered, the very long period of uncertainty – given the manifold appeal and pardon proceedings that are usually applied – and its severe psychological effects was considered to establish a serious risk of a violation of article 3.

More recently, detention in so-called 'Supermax' detention facilities – as an alleged violation of article 3 - were under consideration by the Court. The *Babar Ahmad et al v. UK* judgment (2012) did not find a violation of article 3 in case the applicants were to extradition to the US on terrorism charges and would be (ultimately) detained in a Supermax facility. The application on this issue addressed virtually all aspects of the detention in such a facility, including 23/24 hours solitary confinement, limits to the access to outside communication, alleged inadequate medical and psychological treatment and the application of special administrative (disciplinary) measures etc. etc.

In other cases, also in Babar Ahmad et al, the duration of the potential prison sentence was addressed. The Court considered this issue both in domestic cases, i.e. the execution of imposed life sentences, and in international – extradition – cases, i.e. the risk to be subjected to a life sentence

that is allegedly not compressible. Since *Trabelsi v. Belgium* (2014, definitive since 16 February 2015, request for referral to the Grand Chamber rejected), both situations have been merged by transplanting the domestic 'Vinter-Standard' to the 'extradition – risk Standard'.

Trabelsi brings me to a *possible* answer to the question by our esteemed colleague.

1. CoE Member States v. Third Parties ; CoE Standards v. Other Standards

The above cited cases were all about extraditions to a third State. Although the Court's 'jurisdiction' is limited to the Council of Europe, the Court as always underlined the member states' responsibility when removing (expulsing) or extraditing persons to third States under the Convention.

At the same time, the Court has consistently underlined that it cannot impose Council of Europe, Convention, standard to third States – see in particular: *Soering,* 7 July 1989, § 86, 11 HRU 335 [357] (1990), and *Al-Skeini and Others*, § 141.

Between both clear positions lies a tension field that appears to be interpreted in a way that the Court in practice does the opposite of what it proclaims not to do. De facto, the Convention standards are applied to third parties legal systems and practises.

This conclusion is however not to be drawn from every ECtHR's judgment: in some cases the Court did extensively rely on both domestic case law and on instruments, domestic law and case law of other levels than the CoE, such as the United Nations and of other states than Council of Europe member states. The long and detailed judgment inn Babar Ahmad for instance did rely many other (prison) standards than just Council of Europe Standards: EU and UN instruments, both binding and non-binding, were taken aboard. The Court did also look into Commonwealth and US case law re. the execution of sentences and on life imprisonment (the second admissible prone of the application).

If a third state is involved – as the requesting state – a wider appreciation from more than just the Council of Europe's angle is warranted since it helps to assess the seriousness of the risk of a violation of article 3 or any other article for that matter, while voiding an indirect application of CoE standards to a third State.

In other cases such a wider ranging appreciation of the matter at hand was not performed by the Court, even when the application regarded a very similar situation: the same third State is the requesting State and the same legal issues involving an alleged risk to a violation of the same Convention provision was invoked.

It is in those cases that the Court appears or rather clearly widens its territorial scope and (blindly) tends to apply Council of Europe standards to third States, albeit *via* finding a violation in respect of the CoE member State that is the requested State. The outcome of the more restricted analysis, i.e. strictly limited to CoE standards, also involves a significant lowering of the consistently applied criteria

for the evaluation of the alleged violation of the invoked fundamental right. The requirement of a (concrete) *serious* risk, becomes the mere indication of a (simple) *risk* to a violation of, for instance article 3.

In order to substantiate the above, I refer to a recent note that I enclose as an annex. It is written by the former president of the Belgian Constitutional Court. Marc BOSSUYT, " The European Court of Human Rights and irreducible life sentences. The Trabelsi v. Belgium judgment of 4 September 2014", *Human Rights Law Journal,* 2014, Vol. 35, n° 7-12, at 269-275, in particular at 273 and following.

To round up: when assessing human rights concerns domestically in the course of an extradition matter involving a third – requesting – State, a more reluctant or "very cautious" (*Babar Ahmad and Others,* § 179) approach is warranted, albeit an approach that is fully against the background of the CoE / ECtHR standards. If the prison conditions in the requesting third State would be at stake – a thorough analysis and comparison of both (or all) sets of standards should be the test. In the end, and I modestly speak as a non-expert in prison standards, I am quite convicted that the different standards are not that different at all. The bottom line is to always apply criteria on the basis of a solid basis of sufficient and reliable *facts*, facts that – if needed – should be obtained from the requesting State and from other sources.

E.V.

APPENDIX

THE EUROPEAN COURT OF HUMAN RIGHTS AND IRREDUCIBLE LIFE SENTENCES

The Trabelsi v. Belgium Judgment of 4 September 2014[1]

by **Marc Bossuyt**, Antwerp*

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In accordance with the judgment of the European Court of Human Rights (hereinafter: the Court) in the case *Soering* v. the United Kingdom (Pl. Crt, 7 July 1989),[2] Member States of the Council of Europe do not extradite to any country persons, whatever the charges they face, if they run the risk of being subjected to the death penalty. The (Plenary) Court decided that the extradition of Soering, a German national who had killed the parents of his girlfriend in Virginia where he would run a real risk of spending years on death row, would violate Article 3 of the Convention, which provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". Since 9 July 2013, the Court considers that also irreducible life sentences are inhuman punishments.

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[1] EurCourtHR *Trabelsi* v. Belgium, 4 September 2014, full text in 34 HRLJ pp. 379-397 (2014), in the present issue.

[2] All cases referred to are from the European Court of Human Rights. They can be found by referring to their name and date in the Hudoc database of the European Court of Human Rights (http://www.echr.coe.int/echr/). Unless indicated otherwise, all judgments referred to were rendered unanimously.

I. The European case-law with respect to life sentences

Gradually, the Court became more demanding as to the imposition of life sentences, first in a domestic context and, since 4 September 2014, also in the context of extraditions, even to non-Member States of the Council of Europe.

1. Non-violations of Article 3

In inadmissibility decisions taken in 2001-2003, the Court[3] did not rule out the possibility that the imposition of an irreducible life sentence might raise an issue under Article 3 of the Convention.[4] The first case in which the Grand Chamber of the Court dealt with the issue of irreducible life sentences was *Kafkaris* v. Cyprus (GC, 12 February 2008). In that judgment concerning a domestic context, the (Grand Chamber of the) Court, by 10 to 7,[5] did not find a violation of Article 3 of the Convention. Nor did the (Chamber of the) Court find such a violation in three judgments of 2012 against the United Kingdom (two concerning extradition requests by the United States and one concerning a domestic context).

(1) In its judgment *Harkins and Edwards* v. the United Kingdom (17 January 2012), the Court considered that, as far as both applicants, a British and a U.S. national, were concerned, a mandatory or a discretionary sentence of life imprisonment without parole would not be "grossly disproportionate". Moreover, they had not yet been convicted and it was not certain that, even if the point at which their continued incarceration would no longer serve any purpose were ever reached, the State Governors would refuse to commute their sentence.

(2) In its judgment *Babar Ahmad and Others* v. the United Kingdom (10 April 2012) concerning four British nationals as well as an Egyptian and a Saudi Arabian national, indicted on various charges of terrorism, the Court also did not find a violation of Article 3 of the Convention as a result of conditions at ADX Florence (a so-called "supermax" prison in Colorado) or the length of their possible sentences, if they were extradited to the United States.

(3) In another judgment (*Vinter and Others* v. the United Kingdom, 17 January 2012) concerning a domestic context (three British nationals, serving mandatory sentences of life imprisonment), the (Chamber of the) Court, by 4 to 3, considered that, when the sentence is "discretionary", "an Article 3 issue cannot arise at the moment when it is imposed" (§ 92) and that, even when it is "mandatory", it is not "*per se* incompatible with the Convention" (§ 93). The (majority of the Chamber of the) Court was satisfied that the incarceration of Vinter, who has only been serving his sentence for three years, as well as the continued incarceration of Bamber and Moore, serves "the legitimate penological purposes of punishment and deterrence". Those two applicants, who had served respectively 26 and 16 years in prison, had been effectively re-sentenced in 2009 by the High Court which gave "relevant, sufficient and convincing reasons for its decision" (§ 95).

The minority judges of the (Chamber of the) Court, on the contrary, concluded that

> "there was a procedural infringement [of Article 3 of the Convention] by reason of the absence of some mechanism that would remove the hopelessness inherent in a sentence of life imprisonment from which, independently of the circumstances, there is no possibility whatsoever of release while the prisoner is still well enough to have any sort of life outside prison".

In their opinion,

> "there should already be in place [right from the beginning] a suitable [review] mechanism in the domestic system [... affording] a measure of hope to the convicted person".

That judgment did not become final as it was referred to the Grand Chamber.

2. Violations in a domestic context

By taking sides with the minority of the Chamber judgment in the case *Vinter and Others*, the Grand Chamber judgment of 9 July 2013 in that case became the first in which the Court, by 16 to 1,[6] found a violation of Article 3 of the Convention because the applicants were sentenced to an irreducible life sentence.[7] According to the (Grand Chamber of the) Court, a life sentence should be "*de jure* and *de facto* reducible" (§ 108) and the life prisoner should have, "a prospect of release"[8] and "a possibility of review" (§ 110)

> "which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds" (§ 119).

A crucial element in this judgment is that the life prisoner should know, "at the moment of the imposition of the life sentence" (§ 122),[9] when such a review will take place. That review should be no later than 25 years[10] after

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[3] *Nivette* (3 July 2001) and *Einhorn* (16 October 2001, 22 HRLJ 267 (2001)) v. France and *Stanford* (12 December 2002) and *Wynne* (22 May 2003) v. the United Kingdom.

[4] The European Commission of Human Rights declared on 6 May 1978 the application of *Kotälla*, a German national condemned in 1948 in the Netherlands for war crimes, inadmissible. The Commission did not find any provision of the Convention, including Article 3, which could be read "as requiring that an individual serving a lawful sentence of life imprisonment must have that sentence reconsidered by a national authority, judicial or administrative, with a view to its remission or termination".

[5] Five judges of the minority (of seven) considered that the applicant had no "real and tangible prospect of release", because the power of the President was discretionary and there were no "adequate safeguards against arbitrariness" (§§ 3 and 6). In his dissenting opinion, Judge Javier Borrego Borrego (Spain) considered the reasoning of the judgment "far removed from reality, as though it had been pronounced in an ivory tower" (§ 1).

[6] In his dissenting opinion, Judge Mark Villiger (Liechtenstein) stated that the Court did not do justice to "the cardinal importance of [Article 3] within the Convention".

[7] On this judgment, see M. De Rue, "Les peines de perpétuité réelles sont contraires à la dignité humaine: la Cour européenne des droits de l'homme consacre un droit à l'espoir pour tous les condamnés (Cour eur. dr. h., Gde Ch., *Vinter e.a. c. Royaume-Uni*, 9 juillet 2013)", *Rev. trim. D. H.*, 2014, 667-687.

[8] In her concurring opinion, Judge Ann Power-Forde (Ireland) stated that she voted with the majority, while sharing many of the views expressed by Judge Villiger, since the Court confirmed that Article 3 encompasses "the right to hope [,...] an important and constitutive aspect of the human person".

[9] In his concurring opinion, Judge Paul Mahoney (the United Kingdom) stated that "the abhorrence of torture and of inhuman or degrading punishment or treatment in a democratic society is such that it requires [...] measures foreseeably entailing potential violations in the future, so as to prevent such future violations occurring" (§ 5). It is this "preventive requirement [of the prohibition on irreducible life sentences, 'inherent in Article 3'] that should logically come into play at the moment of sentencing and not later" (§ 7).

[10] The Court observes that a large majority of Contracting States guarantees, if they impose life sentences, a review of those sentences, usually after 25 years' imprisonment, (§ 117) and that Article 110(3) of the Rome Statute of the International Criminal Court provides for review of a life sentence after 25 years (§ 118).

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the imposition of the whole life sentence (§ 120) and be conducted preferably "within a wholly judicial framework" (§ 124).

In two Chamber judgments (*Öcalan* v. Turkey *(N° 2)*, 18 March 2014, and *László Magyar* v. Hungary, 20 May 2014) posterior to the Grand Chamber judgment *Vinter and Others* (GC, 9 July 2013), the Court found a violation of Article 3 of the Convention as to the imposition of a life sentence without possibility of conditional liberation. Neither the possibility of liberation on humanitarian grounds or of an amnesty law,[11] nor the institution of presidential clemency,[12] did prevent the qualification of their penalty as irreducible.[13]

3. The first violation in an extradition context

The (Chamber) judgment *Trabelsi* v. Belgium (4 September 2014) is the first in which the Court found a violation of Article 3 of the Convention in the extradition of an applicant upon whom an irreducible life sentence is liable to be imposed. That judgment became final on 16 February 2015 when the panel rejected the request of the Belgian Government to refer the case to the Grand Chamber.

a) As to the facts

Arrested in Belgium on 14 September 2001, Nizar Trabelsi, a Tunisian national,[14] was sentenced to ten years' imprisonment on 30 September 2003, upheld by the Brussels Court of Appeal on 9 June 2004, for attempting to blow up the Kleine Brogel Belgian army base (§§ 8-9). On 24 June 2012 (§ 55), after the completion of his sentence, including nine months imposed upon him in 2007 (§ 11), he was taken into custody pending extradition at the request[15] of the United States where he was charged of

> "A. Conspiracy to kill United States nationals outside of the United States [... while in Germany, and elsewhere in Europe, and in Afghanistan, and ...] B. Conspiracy and attempt to use of weapons of mass destruction, [... both offences carrying a maximum term of life imprisonment]" (§§ 13, 15).

On 12 November 2008, the U.S. authorities assured the Belgian Government that he would not be prosecuted before a military commission and that he would be detained in a civilian facility (§ 17). On 11 November 2009, the U.S. Department of Justice added:

> "If, however, Trabelsi is sentenced to life, he would not be eligible for any reduction in his sentence. Finally, Trabelsi can apply for a Presidential pardon or sentence commutation. [...] However, this is only a theoretical possibility in Trabelsi's case. We are not aware of any terrorism defendant ever having successfully applied for a Presidential pardon or sentence commutation" (§ 22).

On 23 December 2009, the applicant lodged an application with the European Court.

The Indictments Division of the Court of Appeal of Brussels having on 10 June 2010 issued a favourable opinion on the applicant's extradition, specifying a number of conditions (§ 26), the U.S. Authorities confirmed on 10 August 2010 that he was not liable to the death penalty, that he would not be extradited to any third country, that the maximum life sentence was not mandatory and that the U.S. legislation provided for several means of reducing life sentences (§ 27).

On 23 November 2011, the Minister for Justice adopted a ministerial decree granting the applicant's extradition to the U.S. Government.[16] On 6 December 2011, the day of the notification of that decree to the applicant, he lodged a request with the Court for the indication of an interim measure, pursuant to its Rule 39.[17] The Court acceded to that request the same day (§§ 38-39). On 23 September 2013, the application for judicial review of the ministerial decree was dismissed by the *Conseil d'Etat*. Ten days later, on 3 October 2013, and despite the interim measure ordered by the Court, the applicant was extradited to the United States.[18]

b) As to the law

While inferring from the diplomatic note of the U.S. authorities of 10 August 2010 that "there are several possibilities for reducing" a life sentence (§ 134), but noting that they have "at no point provided an assurance that the applicant would be spared a life sentence", the (Chamber of the) Court considers, in its judgment of 4 September 2014, that the explanations of the U.S. authorities are "very general and vague and cannot be deemed sufficiently precise" (§ 135).[19]

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That paragraph 3 reads as follows: "When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time."

[11] *Öcalan v. Turkey* (N° 2) (18 March 2014), §§ 203-204.

[12] *László Magyar* v. Hungary (20 May 2014), § 58.

[13] In its judgment (posterior to *Trabelsi* v. Belgium, 4 September 2014, below at p. 379 ff.) *Bodein* v. France (13 November 2014), the (Chamber of the) Court did not find a violation of Article 3 in a condemnation of the applicant on 2 October 2008 to irreducible life imprisonment, because the irreducible aspect of his condemnation can be subjected to a judicial review 30 years after his deprivation of liberty. This may happen in 2034 (26 years after his final condemnation) when he will be 87 years old.

[14] On 26 January 2005, he was sentenced *in absentia* by a Tunisian military court to ten years' imprisonment for belonging to a terrorist organisation abroad in peacetime (§ 10). His asylum application submitted on 25 August 2005 was dismissed by the Commissioner General for Refugees and Stateless Persons on 10 April 2009. That decision was upheld by the Aliens Appeals Board on 18 May 2009 (§ 12). Under a ministerial decree of 23 November 2011, the Minister for Justice refused the Tunisian authorities' request for the applicant's extradition (§ 33).

[15] That request was declared enforceable by the Tribunal of Nivelles on 19 November 2008, uphold by the Court of Appeal of Brussels on 19 February 2009 and the Court of Cassation on 24 June 2009 (§§ 18-21).

[16] It was noted in the decree that "no re-extradition to the Tunisian Republic [was] possible" and that "[t]he constituent elements of the respective US and Belgian offences, their scope and the place(s) and time(s) of their commission [did] not match up" (§ 31).

[17] Rule 39, § 1: "The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings."

[18] On this case (up to the moment of the extradition of the applicant), see S. Watthée, "L'affaire *Trabelsi*, ou comment la lutte contre le terrorisme prend le pas sur le respect par la Belgique de ses obligations conventionnelles", *J. T.*, 2013, 727-729; on the judgment of 4 September 2014, see the same author in *J. T.*, 2014, 660-662, where she notes the "alarming way" in which the number of interim measures not respected by Member States is increasing.

[19] Judge Ganna Yudkivska (Ukraine) only concurred in that judgment, "albeit with serious hesitations", because of the "regrettably uncertainty" transpiring from the letter of 11 November 2009 which contained the "unfortunate passage" that a Presidential pardon remains "only a theoretical possibility in Trabelsi's case".

The Court concludes that:

"none of the procedures provided for amounts to a review mechanism requiring the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance at the time of imposition of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds" (§ 137).

Noting that the respondent State "deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention" (§ 150), that "it was not for the Belgian State [...] to substitute its own appraisal for the Court's assessment" (§ 151) and that "the Government's actions have made it more difficult for the applicant to exercise his right of petition" (§ 153), the Court also held that the respondent State, by not complying with the indicated interim measure, had failed in its obligations under Article 34[20] of the Convention. The Court awarded the applicant EUR 60,000 in respect of non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

II. Comments

The implications of the *Trabelsi* judgment are particularly worrisome. Henceforth, all 47 Member States of the Council of Europe are prevented from proceeding to extradite to whatever State persons, including those charged with the most barbarous terrorist acts, if the maximum penalty they risk is a life time sentence without a review mechanism. The judgment gives rise to a number of questions.

1. Was the finding of a violation foreseeable?

When the Belgian Minister for Justice took, on 23 November 2011, the decision to extradite Trabelsi to the United States, there was no decision and no judgment of the Court raising the issue of life sentences as an obstacle to extradition. At that time, the most recent judgment was *Kafkaris* v. Cyprus, adopted by the Grand Chamber on 12 February 2008. That judgment concerned a domestic context and the Grand Chamber did not find a violation. Even in the three judgments rendered in 2012, the Court did not find a violation. Moreover, contrary to two of those judgments[21] concerning extraditions to the United States, the only judgment[22] that was not unanimously adopted and that was referred to the Grand Chamber, concerned life sentences in a domestic context.

At the moment of Trabelsi's extradition to the United States, on 3 October 2013, he was already nearly a year and three months in custody pending extradition. His extradition did not take place earlier because the Court had indicated an interim measure on 6 December 2011.[23] That the Government should have attempted "to find an alternative to the applicant's detention whereby the Belgian authorities could still keep him under surveillance", as suggested by the Court (§ 151), is devoid of any sense of reality.[24] As rightly noted by the Court:

"The Government had not wished to run the risk of being unable to honour its commitment to hand over the applicant to the United States because he had escaped or been released" (§ 143).

The Minister for Justice was particularly worried that the Belgian jurisdictions would order Trabelsi's liberation before he could be extradited. Five times, his applications for release have been examined by different tribunals and each time, on appeal, also by different courts of appeals (§§ 55-60). Once, on 24 August 2012, a Tribunal (Hasselt) allowed his application for release, but that decision was set aside by the Court of Appeal of Antwerp. Conscious of that risk, the Minister for Justice requested not less than four times the lifting of the interim measure, but her requests were always turned down by the Court (§§ 40-50). If Belgium had waited until the judgment of the Court (on 4 September 2014),[25] Trabelsi would have spent nearly two years and three months in custody pending extradition, to which five months have to be added before the Chamber judgment became final.

2. Life sentences without parole to be banned?

Let's there be no misunderstanding. There is a large consensus among criminologists that in most cases life sentence without parole is a disproportionate penalty.[26] Consequently, providing a review mechanism for life sentences deserves full support for a recommendation of the Council of Europe or for an EU directive which would require implementation by all 28 EU Members before an indicated deadline. It is, however, doubtful that expanding the scope of Article 3[27] of the Convention in judgments of the Court in Strasbourg is the appropriate way of favouring penal reforms. A judgment of the Court is not a recommendation and the absolute character of the prohibition of Article 3 requires particular caution and restraint.

In any case, imposing a review mechanism as a condition of extradition is a new rule which in a democratic society governed by the Rule of Law and adhering to the principle of the separation of powers, should be entrusted to parliaments and not to courts. As a matter of principle, the creation of new rules is reserved for the Legislator and their interpretation and application to the Judiciary.

There is no doubt that such a review mechanism is an important element of penological reform as is the case with other requirements such as a minimum of square

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[20] "The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

[21] *Harkins and Edwards* (17 January 2012), and *Babar Ahmad and Others* (10 April 2012) v. the United Kingdom.

[22] *Vinter and Others* v. the United Kingdom (17 January 2012).

[23] At the moment of Trabelsi's extradition, already a year and ten months had elapsed since the interim measures were taken.

[24] On 27 February 2006, Fehriye Erdal, liberated under conditions pending extradition to Turkey on charges of terrorist acts, escaped the vigilance of the State Security, the day before she was sentenced to four years of imprisonment. At that moment, she was kept under surveillance by four teams of eight persons equipped with four cars (*Het Nieuwsblad*, 3 March 2006).

[25] The judgment intervened four years and ten months after the submission of Trabelsi's application to the Court (on 23 December 2009) and two years and three months after the Court indicated the interim measure (on 6 December 2011).

[26] For further arguments, see the extensive separate opinion (12 p.) of Judge Paulo Pinto de Albuquerque (Portugal) in *Öcalan* (No. 2), *op. cit. (supra* note 11); see also Gauthier de Beco, "Life Sentences and Human Dignity", *Int. J. H. Rts.* vol. 9 no. 3, September 2005, 411-419.

[27] Using Article 5 of the Convention as terms of reference, as in *Léger* v. France (11 April 2006, §§ 64-77), would have less disadvantages. The Court found violations of Article 5 of the Convention in cases were persons who had been the object of mandatory life sentences were kept in prison on a basis not related to the original conviction (*Stafford* v. the United Kingdom, GC, 28 May 2002) or without a review by a body with the power to order their release (*Hill* v. the United Kingdom, 27 April 2004).

meters for each prisoner, minimum hours of physical exercise, minimum showers a week, a minimum of food calories per day, access to day light and to a decent toilet, etc. All those elements are important and affect the wellbeing of prisoners but they are of a different nature as the death penalty and the flogging of prisoners and some of them have greater budgetary implications than others. That is also why such requirements, when accepted in a domestic context, cannot be imposed on non-European countries as a condition for extradition.

3. Distinctions to be made?

The (Chamber of the) Court rejected[28] the three distinctions suggested by the House of Lords in the *Wellington* case.[29] Those distinctions nevertheless warrant more attention than was given to them.

a) The distinction between extradition cases and other cases of removal of the territory

There is no reason why those to be extradited might be tortured and those to be removed on other grounds might not, or vice versa. However, with respect to both categories, the Court does not appreciate what did happen but what could happen: the Court does not evaluate facts but risks. The risks are greater in cases of extradition than in cases of removal of the territory, since the first take place on the initiative of the country of destination, while the second take place at the initiative of the expelling State. Consequently, greater caution is required in extradition cases than in other removal cases.[30]

b) The distinction between torture and other forms of ill treatment

It is the Convention itself that has prohibited inhuman or degrading treatment or punishment as well as torture. It is obvious that the threshold required for a treatment or a punishment to qualify as inhuman or degrading, is lower than the one of treatment qualified as torture, but it is the same absolute prohibition. Consequently, only a sufficiently high threshold can justify the absolute character of the prohibition. Not every bad treatment or ill-treatment is inhuman or degrading.[31] It has to be treatment inflicted deliberately and knowingly and seriously infringing the human dignity of the person concerned. Only such treatment is absolutely prohibited and does not allow for any restriction, any exception, or any derogation.

c) The distinction between the domestic context and the extra-territorial context

It is the rightful ambition of the States parties to the European Convention to develop a system of international protection of human rights applicable to "advanced democratic societies".[32] Unfortunately, not all States in the world have the same history, culture and traditions, nor have they all attained the same level of welfare as the Member States of the Council of Europe which may explain why the regional level of protection in Europe is on certain issues higher than in other regions of the world. Moreover, as stated by the U.K. Court of Appeal in *Oakes and others*,[33] issues as life sentences are

> "the subject of rational debate and civilised disagreement [... producing] different answers in different countries, and [...] at different times in the same country".

That should be sufficient to allow for a margin of appreciation, at least with respect to non-States parties.

It is not because Europe considers itself as an "advanced democratic society" that it may impose unilaterally its own standards on other societies. In *Babar Ahmad and Others* (§ 177), the Court agreed with Lord Brown that

> "the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States".[34]

In *Trabelsi* (§ 119) also, the Court stated that

> "[By assessing] the situation in the requesting country in terms of the requirements of Article 3 [... it does not ...] 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".[35]

That is what the Court said. It is, unfortunately, not what the Court did. As stated by Judge Yudkivska in her separate opinion to *Trabelsi*, the Court, by requiring that a "potential" whole life prisoner should be "entitled to know that the whole life term is reducible already *as of the moment of facing charges*",[36] hardly complies with the above mentioned statement of Lord Brown. She observed very pointedly that:

> "we cannot impose on the rest of the world the evolution of European standards and the European concept of reintegration [into the society] as the key aim of incarceration".

It is laudable that the Council of Europe has developed an advanced system of international protection of human rights. It applies to everyone under the jurisdiction of one of the States parties to the Convention. But the States parties cannot be expected to keep under their jurisdiction all persons that have succeeded in entering their territory without having been authorized to do so, even if the living conditions in their countries of origin are not as required in our own countries. This is *a fortiori* the case for those that, on the basis of reciprocity as provided for in bilateral or multilateral treaties, should be brought under the jurisdiction of other States in order to be sentenced, when they have committed offences for which the courts and tribunals of those other States are competent.

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[28] *Babar Ahmad and Others*, 10 April 2012, §§ 167-172.

[29] Those distinctions were suggested by the majority (Lord Hoffmann, Baroness Hale and Lord Carswell) in their judgment of 10 December 2008 in *R (Wellington) v. Secretary of State for the Home Department [2008] UKHL 72;* the minority (Lords Scott and Brown) disagreed (*Harkins and Edwards,* §§ 34-39).

[30] See Marc Bossuyt, "The Court of Strasbourg acting as an Asylum Court", *European Constitutional Law Review*, 2012, 203-245, at 205: "Except in the exceptional case of an expulsion on grounds of national security, it is much less probable that the government of the country of destination is interested in a person to be removed of the territory than is the case with a person to be extradited. In most cases of removal, the government of the country of destination is even totally indifferent to the fate of the expelled person. Nevertheless, its cooperation for the readmission of the person to be removed is often indispensable. In a case of extradition, the cooperation of the government is ensured but the person to be extradited risks, at least, legal prosecution which will probably lead to imprisonment".

[31] See Lord Brown in *Wellington* (reproduced in *Babar Ahmad and Others,* 10 April 2012, § 69): "article 3 does not bar removal to non-Convention states (whether by way of extradition or simply for the purposes of immigration control) merely because they impose higher levels or harsher measures of criminal punishment" (referred to with the approval of the Court, *ibid.*, § 177).

[32] See the dissenting opinion (§ 4) of five of the seven judges of the minority in *Kafkaris* v. Cyprus (GC, 12 February 2008).

[33] [2012] EWCA Crim 2435, quoted in *Vinter and Others*, GC, § 50, 33 HRLJ 96 [102] (2013).

[34] Referring to *Al-Skeini and Others* v. the United Kingdom, GC, 7 July 2011, § 141.

[35] Referring to *Soering,* 7 July 1989, § 86, 11 HRLJ 335 [357] (1990), and *Al-Skeini and Others,* (note 34), § 141.

[36] Italics in the text.

4. Weakening international penal cooperation?

Several of those other States accept to give assurances that in no case the death penalty will be imposed on an extradited person.[37] There is no such practice guaranteeing that life sentences will not be imposed without review mechanism that satisfies the requirements set out by the Court in its Grand Chamber judgment in the case *Vinter and Others*. If the Member States of the Council of Europe do not respect their international obligations under those extradition treaties, they may not expect that the other States will do so and the international cooperation in fighting criminality will be badly damaged. At a time that terrorism is a real threat in many countries of the world, international penal cooperation, in particular with respect to persons that commit terrorist acts, should be strengthened rather than weakened.

The Court pretends that

> "it is acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights. It is therefore careful not to underestimate the extent of the danger represented by terrorism and the threat it poses to society [...]. It considers it legitimate, in the face of such a threat, for Contracting States to take a firm stand against those who contribute to terrorist acts" (§ 117).[38]

But, the Court invokes the "absolute nature of Article 3" as an excuse for not giving any weight to this "acute consciousness", "carefulness" and "firmness".

Also in the *Wellington* case, Lord Hoffmann was well aware of the dangers of weakening international penal cooperation when he stated that a relativist approach was "essential if extradition is to continue to function" and that, where the requirement in Scotland of a prisoner to use a chamber pot in his cell ("slopping out") had been considered to cause an infringement of Article 3,[39] it would, if applied in the context of extradition, "prevent anyone being extradited to many countries, poorer than Scotland". Even Lord Brown, quoted with approval by the Court,[40] did not reject all relativism by admitting that a given treatment assumed to be degrading in Scotland must not necessarily be regarded as such in all countries.

But most important, there are different consequences when the finding that a given treatment is contrary to Article 3 takes place in an extraterritorial context rather than in a domestic context. One may assume that it is not the intention of the Court to give retroactive effect (up to 25 years) to its judgment of *Vinter and Others* (GC, 9 July 2013). In a domestic context, a distinction should be made between a sentence imposed after or before that judgment. If it has been imposed after that judgment, it may be expected that the Court will find a violation of Article 3 from "the moment of the imposition of the life sentence".[41] If, however, it has been imposed before that judgment, it may be expected that the Court will find such a violation only if that person still does not benefit of a review mechanism at the moment the Court adopts its judgment. In any case, the finding of a violation does not automatically lead to the immediate liberation of the life prisoner. A review mechanism should be set up and it is only when the life prisoner meets the criteria set out by that mechanism that he will be liberated.

In an extra-territorial context, the situation is quite different. Since the *Trabelsi* judgment, it may be assumed that the Court will find a violation of Article 3 if the person to be extradited risks a life sentence without a review mechanism at the moment of his extradition. If that is the case and if there is no other legal basis for depriving that person of his liberty, he has to be liberated at the moment that it appears that, once extradited, he would run a real risk for such a sentence. If Trabelsi had not been extradited, there would have been no legal basis to keep him in prison. There were no new charges against him in Belgium and he had fully completed his sentence in Belgium. He would have been the perfect example of

> "someone who has no right to live in your country, who you are convinced – and have good reason to be convinced – means to do your country harm [... and ...] *you cannot try them, you cannot detain them, and you cannot deport them*".[42]

Contrary to what would happen in a domestic context, he should have been immediately liberated.

Is it not "grossly disproportionate"[43] that, if a mechanism did exist in the United States providing for a review of Trabelsi's sentence (let's say in 2038), the Court would not object to his extradition to that country even though he would run the risk of spending at least 25 years in prison, after having already spent nearly 13 years in prison in Belgium,[44] but that, in the absence of such a mechanism and as he could not be sent back to his country of origin (Tunisia), he should be allowed to stay as a free man in Belgium? Is the *Trabelsi* case "a sufficiently exceptional case"?[45] Did the Court apply a "strict test"?[46] Is it one of those "rare and unique occasions"?[47] Has the Court been "very cautious"?[48] Is the United States not any longer "a State which had a long history of respect for democracy, human rights and the rule of law"?[49]

5. More caution required?

The Belgian *Conseil d'Etat* was more cautious than the Court when it stated that

> *"it has not been established* that the US authorities would, when appropriate, refuse to implement the available sentence-reducing mechanisms where there

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[37] Already in the European Convention on extradition, adopted under the auspices of the Council of Europe on 13 December 1957, there is an Article 11 on capital punishment that reads as follows: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out."

[38] See below at p. 390, referring to *Othman (Abu Qatada)* v. the United Kingdom, 17 January 2012, § 183, 32 HRLJ 85 [108] (2012).

[39] *Napier v Scottish Ministers* (2005) SC 229, quoted by the Court in *Harkins and Edwards*, 17 January 2012, § 38.

[40] In *Babar Ahmad and Others*, 10 April 2012, § 69.

[41] *Vinter and Others*, GC, 9 July 2013, § 122, 33 HRLJ 96 [112] (2013).

[42] U.K. Prime Minister D. Cameron before the Parliamentary Assembly of the Council of Europe on 25 January 2012 (www.newstatesman.com/politics/2012/01/human-rights-court-national). Italics added. Trabelsi has been indoctrinated by the same man (Djamel Beghal) as the brothers Kouachi who committed the killings at *Charlie Hebdo* in Paris on 7 January 2015.

[43] *Harkins and Edwards*, 17 January 2012, §§ 139 and 141.

[44] In its *Trabelsi* judgment (§ 164, below at p. 394), the Court reiterated that "Article 4 of Protocol No. 7 does not secure the *ne bis in idem* principle in respect of prosecutions and convictions in different States".

[45] *Vinter and Others*, 17 January 2012, § 88, 33 HRLJ 96 [109] (2013).

[46] *Ibid.*, § 89.

[47] *Ibid.*

[48] *Babar Ahmad and Others*, 10 April 2012, § 179.

[49] *Ibid.*

was no legitimate penological justification for continuing the applicant's imprisonment".[50]

This was in line with the approach adopted in *Harkins and Edwards* (§§ 140 and 142) and in *Babar Ahmad and Others* (§ 243) in which the Court stated that the applicants had "*not shown* that their incarceration in the United States would not serve any legitimate penological purpose" and, that it was "*still less certain*" that the U.S. authorities would refuse to avail themselves of their power to commute the applicant's sentence. In the latter case, the Court had also observed (*ibid.*) that it was "*by no means certain*, that, if extradited, these applicants would be convicted".[51]

As observed by Judge Yudkivska, Trabelsi was also "not yet convicted (unlike the applicants in *Vinter and Others*)". She considered

"too remote and abstract [the] assessment of a potential 'irreducible life sentence' which may be imposed if (1) the charges against the applicant are proved during the trial (for the moment he is presumed innocent), if (2) he is really sentenced to life imprisonment, and if (3) in some twenty-five or thirty years the legal situation and penal policy in the United States of America have not changed and/or if (4) the future President refuses to pardon him".

In this case, too much importance has been given to the "unfortunate passage"[52] in the letter of 11 November 2009 in which the U.S. Department of Justice stated that Trabelsi could apply for a Presidential pardon or sentence commutation, but added the following:

"However, this is only a theoretical possibility in Trabelsi's case. We are not aware of any terrorism defendant ever having successfully applied for a Presidential pardon or sentence commutation" (§ 22).

However, in a subsequent diplomatic note (10 August 2010), the U.S. authorities implicitly contradicted that statement by describing at length[53] the relevant legislation providing several means of reducing life sentences.

Moreover, it is difficult to dispute the relevance of the points raised by Judges Villiger and Yudkivska:

"How can the Court know what will happen in ten, twenty or thirty years?"[54]

"No one can predict what will happen in twenty-five or thirty years".[55]

Since the *Soering* case, the Court admits, on the basis of the absolute prohibition of Article 3, the indirect responsibility of the States parties to the Convention for treatment inflicted by non-States-parties. Contrary to Trabelsi, the non-extradition of Soering would not have led to impunity because, on the basis of the nationality of the applicant, Germany had also requested his extradition.

The indirect responsibility brings the Court, as already said, to speculate about risks rather than evaluating facts. In *Trabelsi,* the Court speculates about what might happen in a State non-party to the Convention 25 years from now. Indeed, the Court requests guarantees that if the person to be extradited is *found guilty* and *if* he is condemned to the maximum penalty of life imprisonment, the *possibility* of his liberation will be re-examined within *25 years* from now. Despite all those conditionals, the Court requests certainty about what will happen in the future, moving further and further away from factual reality.

When relying on Article 3, the Court should at least, as stated by Judge Villiger in his dissenting opinion in *Vinter and Others* (GC, 9 July 2013), have the "'standards' and 'requirements' [of Article 3] explained, analysed and applied". As also stated by Judge Villiger, the finding of a violation of Article 3 "normally require[s] an individualised assessment of each applicant's situation" rather than "a generalised interpretation".

It is surprising that the (Chamber of the) Court moved so easily from a domestic to an extraterritorial context in requiring a review mechanism for life sentences. In doing so, it ignored the different consequences both for the applicants as for international penal cooperation. It is understandable that the Court was in a bad mood[56] because Belgium had decided to give priority to its international obligations towards the United States rather than to the interim measure indicated by the Court under its Rules of procedure.[57] However, in view of the possible disastrous implications of its judgments, a Court cannot afford to be in a bad mood, certainly not at a time that barbarous acts, including beheadings, take place in some parts of the world.

It is certainly embarassing for the Court that a country like Belgium choose deliberately not to respect an interim measure taken by the Court. It is one of those examples that illustrate what Jan Helgesen[58] said: "we left the governments behind, we have lost them". Some soulsearching by the Court may not be out of place. The Court might wonder whether the mechanical combination of continually[59] lowering the threshold of Article 3 of the Convention[60] and/or enlarging its scope of application[61] with the imposition of extraterritorial effects of such

[50] *Trabelsi*, § 36, italics added, below at p. 383.

[51] Italics added.

[52] The expression is from Judge Yudkivska in her separate opinion to *Trabelsi,* below at p. 397.

[53] 321 words in *Trabelsi* (§ 27, below at p. 381 f.): "[...] a life sentence is not mandatory; [...] a defendant has a statutory right to appeal the conviction and sentence, [...] there are certain statutory bases for reduction of an already-imposed sentence, [...] the defendant may request that his sentence be reduced as an exercise of executive clemency by the President of the United States. [...] There are established regulations and procedures governing the application process for executive clemency, [...] The U.S. Constitution gives the President absolute discretion to grant executive clemency to a defendant. [...] such relief has, on occasion, been granted for serious offenses implicating national security".

[54] Judge Villiger in his dissenting opinion to *Vinter and Others,* GC, 33 HRLJ 96 [118] (2013).

[55] Judge Yudkivska in her separate opinion to *Trabelsi,* below at p. 397.

[56] See also the very high compensation (EUR 90,000, i.e. EUR 60,000 for non-pecuniary damages and EUR 30,000 for costs and expenses) awarded to a person who has been condemned for terrorism.

[57] The Court declared in *Mamatkulov and Askarov* v. Turkey (GC, 4 February 2005, 26 HRLJ 39 (2005)) that such measures had become binding. On the weak basis for the binding legal force of those measures, see Marc Bossuyt, "Judges on thin ice: the European Court of Human Rights and the Treatment of Asylum Seekers", *Int-Am. & Eur. Hum. Rts J.,* 2010, 3-48, at 14-21.

[58] European Court of Human Rights, *Dialogue between Judges,* Council of Europe, Strasbourg, 2011, 25.

[59] The so-called "slippery slope", see Marc Bossuyt, "Is the European Court of Human Rights on a Slippery Slope?", in: Spyridon Flogaitis, Tom Zwart & Julie Fraser (Eds.), *The European Court of Human Rights and its discontents: Turning Criticism into strength,* 2013, Cheltenham, Edward Elgar, 217 p., at 27-36.

[60] On the trivialisation of Article 3, see Marc Bossuyt, "Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU Asylum Law (*M.S.S.* v. Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011)", *E.H.R.L.R.,* 2011, 581-596, at 589-591, and more generally Steven Dewulf, *The Signature of Evil: (Re)Defining Torture in International Law,* Antwerp, Intersentia, 2011, 647 p.

[61] Englobing "living conditions" in a state party in *M.S.S.* v. Belgium and Greece (GC, 21 January 2011, § 263, 31 HRLJ 121 [142] (2011)) on the issue of living conditions in Greece, by 16 to 1

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interpretations and applications on non-States parties will not lead to results that sooner or later reach the borderlines of what can be considered reasonable.

The Court might have avoided the unfortunate consequences of the extraterritorial effects of enlarging the scope of Article 3, by mitigating the indirect responsibility of a State party when such effects amount to imposing the Court's interpretation of Convention standards on States non-parties to the Convention.

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(Judge András Sajó, Hungary), and in non-states parties in *Sufi and Elmi* v. the United Kingdom (28 June 2011, § 291) or medical treatment, even when – due to different patent regulations – 100 or 200 times more expensive in developed than in developing countries – as favoured in the separate opinion of six judges in *Yoh-Ekale Mwanje* v. Belgium (20 December 2011) and in the dissenting opinion of Judge Power-Forde in *S. J.* v. Belgium (27 February 2014, no. 70055/10; on the non-violation of Article 3, by 6 to 1).