Life Imprisonment Without Prospect of Release: Comparative Remarks from a Human-Rights Perspective

di Diego Mauri

Abstract: Pena perpetua senza prospettiva di rilascio: una comparazione dalla prospettiva dei diritti umani – Life imprisonment without prospect of release is a penalty experiencing remarkable success today, especially in Europe. However, certain human rights bodies have recently begun to assert that this penalty runs counter the so-called 'right to hope', derived by way of interpretation from the right not to be subject to inhuman or degrading treatment. The purpose of the present contribution is to shed light on the potential and the limits of such trend by analyzing the case-law of universal (such as the UN system) and regional (the European system, the Inter-American system; the African system) bodies.

Keywords: Life imprisonment; Human rights; Prohibition on inhuman and degrading treatment; Right to hope; Rehabilitation.

1. Introduction

Crimes and penalties are inherently state prerogatives: it is up to States to decide what are to be considered the worst offences directed to them (crimes) and how to punish their offenders (penalties), which constitutes the core of their *jus puniendi* – that is, the 'right to punish'[1]. This premise, apparently trivial for lawyers, in fact suggests further reflections to the international lawyer: crimes and penalties, and more generally all that concerns the act of punishing, fall within States' domestic jurisdiction (*domaine réservé*). International law is not meant to raid such province.

Far from being a postulate, this assertion – which surely held true some decades ago – needs to be amended in light of supervened conditions. International law, and more specifically international human rights law (IHRL), has come to establish that States are not free to punish offenders by all means: boundaries exist. For example, in 1948 the United Nations (UN) General Assembly proclaimed the Universal Declaration of Human Rights (UDHR), whose Art 5 reads: 'No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment'[2]. Albeit through an instrument per se void of binding force, States recognized an embryonic limitation to their inherent *jus puniendi*: they shall not carry out 'cruel, inhuman or degrading' penalties. Their *domaine réservé* on the matter of punishment begun to crumble then.

[1] C. Beccaria, *Dei delitti e delle pene*, edited by R. Fabietti, Milan, 1973.
[2] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.

The present contribution moves from this evidentiary circumstance, and aims at tackling a specific form of punishment, namely life imprisonment that – either *de jure* (that is, by express legal provision) or *de facto* (that is, as a result of factual circumstances) – *denies* or *unreasonably limits* the access to key benefits such as the reduction or remission of the penalty originally imposed. In other words, focus will be on forms of life imprisonment in which prospect of release is absent or, albeit provided, is not materially accessible to prisoners. The phrase 'life imprisonment without prospect of release' adequately – yet not perfectly – describes such form of punishment, and will thus be employed hereinafter[3].

The topicality and the relevance of such issue derives from a threefold circumstance. First, it is argued that the (almost) widespread abolition of death penalty – by far the most severe form of punishment – has brought about a re-discovery (and sometimes even a discovery) of life imprisonment[4]. Second, many have begun to argue that a whole-life limitation of basic rights (such as liberty) raises a number of concerns that is not necessarily inferior to that raised by death penalty[5]. Third, despite the spread and the severity of such penalty, surprisingly there is little to no literature dedicated to its implications from human-rights oriented perspective[6]. As an author has brilliantly suggested, today life imprisonment deserves being 'taken seriously' *à la* Dworkin, not only at the domestic level but also at the international one[7].

A definitional hurdle has to be solved preliminarily: it is impossible to refer to 'life imprisonment without prospect of release' as a unitary notion, a conclusion implied from the circumstance that in principle each State maintains the prerogative to establish punishments[8]. Thus, for instance, in the US legal system life imprisonment exists in a variety of forms, ranging from life imprisonments allowing an individual to be considered for early release after a period of time (one year or forty years) to life imprisonment without parole. In Italy, two large families of life imprisonment exist, namely 'ordinary' life imprisonment (the so-called *ergastolo*) and life imprisonment preventing individuals from accessing relevant penitentiary benefits absent specific conditions (the so-called *ergastolo*

[3] For a different categorization of forms of life imprisonment, see D. van Zyl Smit, C. Appleton, *Life Imprisonment. A Global Human Rights Analysis*, Harvard, 2019, xi ff.

[4] UN Secretary-General, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, ESCOR, UN Doc. E/2010/10, 1 32 (2009). Today, life imprisonment is a statutory penalty in 183 out of 216 countries and territories worldwide: see D. van Zyl Smit, C. Appleton, *supra* note 3, xi ff.

[5] For instance, the same Cesare Beccaria expresses his personal preference for life imprisonment as a paradoxically harsher penalty than the capital punishment: see Beccaria, *supra* note 1, 69 ff. Also religious leaders, such as Popes, have joined academic reflection on this topic: see *amplius* M. Abellán Almenara, D. van Zyl Smit, *Human Dignity and Life Imprisonment: The Pope Enters the Debate*, in 15 *Human Rights Law Review* 369 (2015), and also the landmark work of L. Eusebi, *La Chiesa e il problema della pena: sulla risposta al negativo come sfida giuridica e teologica*, Brescia, 2014.

[6] N. Bernaz, *Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward*, in 35 *Human Rights Law Quarterly* 470 (2013), 471.

[7] D. van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law*, The Hague, 2002.

[8] *Ibidem*, 1-3.

ostativo). The Italian case will make the object of *ad hoc* reflections below, as the *ergastolo ostativo* has been found in contravention with obligations stemming from the European Convention on Human Rights (ECHR) in the recent and landmark case *Viola v. Italy (No 2)*[9]. This decision contains the European Court of Human Rights (ECtHR)'s most advanced reflections on life imprisonment without prospect of release. A request for referral to the Grand Chamber formulated by the Italian Government has been rejected in October 2019, which renders the judgment final[10].

Having said this, life imprisonment without prospect of release may be addressed from opposite, yet intertwined, viewpoints: one goes from the individual subject to this penalty, the other from the functions traditionally believed to be exercised by penalties in criminal law.

Approaching this penalty from the prisoner's standpoint, in its fundamental sense the penalty amounts to denying the prisoner any hope to be realistically readmitted in the society. Especially in the European context – which will be at the center of the present analysis – there is a recent trend referring to an alleged prisoners' 'right to hope' that would be violated in case of life imprisonment without prospect of release[11]. A key point is to assess whether (and, in the positive, to what extent) such right can be said to exist at the universal level, or whether it has been gaining traction only on a limited scale, namely within the European system of protection of human rights.

Surely, the fact that convicted individuals hope for their release is part and parcel of the more general process of rehabilitation – which is now believed to be (one of) the main purpose of punishment. Given its acknowledgement by most IHRL instruments, one may expect that rehabilitation requires recognition of prisoners' 'right to hope' and therefore outright rejection of life imprisonment without prospect of release. In fact, the situation is different, as will be shown throughout this contribution.

These complex issues will be tackled from a comparative perspective, that is by contrasting the main IHRL instruments and the relevant monitoring bodies' case-law; conversely, domestic legislations fall outside the scope of the present analysis, and will be considered only to the extent that they offer an effective contribution to the IHRL debate[12]. First, attention will be paid to the universal level with a view to identifying some general approaches (Section 2). Focus will then be moved to regional instruments, in turn: the European system (Section 3); the Inter-American system (Section 4); the African system (Section 5). This overview will allow for a global analysis aiming to show in which systems the 'right to hope' and the purposes of rehabilitation are better fostered, and where –

[9] App. No. 77633/16, 13 June 2019.
[10] See hudoc.echr.coe.int/eng-press#%20.
[11] On the right to hope, see generally P. Pinto de Albuquerque, *Life imprisonment and the European right to hope*, in *Rivista AIC*, n. 2/2015.
[12] For a short but comprehensive survey of life imprisonment in domestic legal orders, see Penal Reform International, *Life Imprisonment. A Policy briefing*, April 2018.

and possibly why – a human-rights oriented reflection on life imprisonment without prospect of release is totally or partly lacking (Section 6).

2. The International Covenant on Civil and Political Rights

Looking at the universal layer, the International Covenant on Civil and Political Rights (hereinafter: the ICCPR) contains an explicit provision in favor of rehabilitation, namely Art 10(3), which reads: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'[13].

From a systematic perspective, this provision seems endowed with very high potential: Art 10(1) solemnly establishes that all prisoners must be treated in accordance with their inherent 'dignity'. The concept of human dignity is a key one: it first surfaced in the UDHR[14], it is echoed in the very Preamble of the ICCPR[15], and it inspires a conspicuous portion of IHRL jurisprudence. It is therefore implied that the purpose of rehabilitation is required by the respect of the prisoners' dignity: penalties must aim at rehabilitating the individuals and allowing for their readmission in the society. Retribution alone is not consistent with the ICCPR: so goes General Comment No. 21[16], and most commentators are on the same page[17]. Soft-law instruments such as the former *UN Standard Minimum Rules for the Treatment of Prisoners*[18] as well as the more recent *Mandela Rules*[19] contain clear provisions in favor of prisoners' return to society. In addition, parallel indications derive from the Statute of the International Criminal Court[20]. In sum, Art 10(3) seems situated within an unequivocal normative framework.

Yet, the provision's practical application has not met the expectations of those who advocate for a human rights-based sensitiveness towards punishment so far: in a very limited number of case the ICCPR's monitoring body, the Human Rights Committee (HRCttee or Committee), has had the occasion to apply Art 10(3). For example, in a recent case, the HRCttee has held that failure to keep post-conviction preventive detainees distinct from life prisoners contravened both Art

[13] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.
[14] See *supra* note 2, Preamble, Art 1 ('All human beings are born free and equal in dignity and rights'), Arts 22-23.
[15] See *supra* note 11, Preamble ('… recognition of the inherent dignity … is the foundation of freedom, justice and peace in the world'; 'these rights derive from the inherent dignity of the human person').
[16] Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 10 April 1992, HRI/GEN/1/Rev.9, para 10.
[17] A. Ploch, *Why dignity matters: Dignity and the right (or not) to rehabilitation from international and national perspectives*, in 44 *International Law and Politics* 887 (2012), 906-907.
[18] UN General Assembly, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, Rules 58-61, 65, 66 and *passim*.
[19] UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 8 January 2016, A/RES/70/175.
[20] *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, Art 110; see also *Rules of Procedure and Evidence*, 3-10 September 2002, Official Records ICC-ASP/1/3, Rules 223, 224.

9 (1) ICCPR (the provision against arbitrary detention) and Art 10(3) ICCPR, inasmuch this imprisonment condition is inadequate to ensure rehabilitation[21]. That being said, specific pronouncements on Art 10(3) are scarce. While case-law on death penalty has been growing exponentially in the last decades[22], the same has not happened with respect to life imprisonment in general, and life imprisonment without prospect of release in particular. As has been observed, the very issue of life imprisonment had been totally neglected by Delegations during the drafting process of the Covenant[23]; its practical application largely pursued the same path.

The same holds true also from the standpoint of Art 7 ICCPR, which prohibits inhuman and degrading 'treatment or punishment'. This prohibition has made the basis, for example, for rejecting corporal punishment and all forms of punishment involving serious physical and mental suffering[24]. This has never resulted in a finding that life imprisonment without prospect of release constitute such treatment; on the contrary, it has been considered as legitimate in principle. However, if on certain conditions life imprisonment without prospect of release were applied in a manner that it resulted in such forms of punishment, Art 7 ICCPR would be a relevant provision. The point is that the number of applications raising Art 7 complaints is as much limited as is for Art 10(3).

In *Weiss v. Austria*, the HRCttee was asked to declare that a *de facto* life imprisonment (845 years reducible to 711 years for good behavior) violated the prohibition on degrading and inhuman punishment enshrined in Art 7 ICCPR. The Committee held that in principle life imprisonment without prospect of release 'may' raise issues with respect to the prohibition on inhuman and degrading punishments (Art 7) read in conjunction with Art 10(3)[25], but eventually declared the case inadmissible. So far it has not declared any State responsible for violating such provisions. However, it has provided useful indications on how life imprisonment must be organized and served to be compliant with the ICCPR. For instance, the HRCttee has held that there is a legal obligation to conduct a review of the prisoner's status after serving the non-parole period where provided[26]; the issues of *de facto* whole-life imprisonment (such as 75 years)[27] and the non-parole period duration[28] have been considered as well, albeit only incidentally or by separate opinions. In addition, the Committee has also

[21] *Miller and Carroll v. New Zealand*, Comm. No. 2502/2014, 21 November 2017.
[22] *Judge v. Canada*, Comm. No. 829/1998, 5 August 2002; *Thompson v. Saint-Vincent-and-the-Grenadines*, Comm. No. 806/1998, 18 October 2000; *Ng v. Canada*, Comm. No. 469/1991, 5 November 1993.
[23] See M. Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Kehl am Rhein, 2005, 254 ff.
[24] See for instance HRCttee, *General Comment No 20: Article 7*, 3 October 1992, HRI/GEN/1/Rev.9, paras 5, 6. See also Bernaz, *supra* note 6, 493 ff.
[25] *Weiss v. Austria*, Comm. No. 1821/2008, 24 October 2012, para 9.4.
[26] See *Tai Waikiri Rameka and Others v. New Zealand*, Comm. No. 1090/2002, 6 November 2003, para 7.3.
[27] *Teesdale v. Trinidad and Tobago*, Comm. No. 677/96, 1 April 2002, Concurring Opinion of Mr. Lallah.
[28] *Hankle v. Jamaica*, Comm. No. 710/96, 28 July 1999, Concurring Opinion of Mrs. Chanet.

emphasized that parole mechanisms must be operated in a way that conforms to the principle of non-discrimination[29], and that in order for them to be accessed they may attach some importance to the prisoner's behavior[30]. Finally, it held that the possibility of release must be considered by an independent judiciary body[31].

Conversely, more attention has been paid to the (more specific) issue of sentencing juveniles to life imprisonment. In this field, it must be recalled that other international instruments expressly contain prohibition of such penalty on minors. In particular, Art 37 of the UN Convention on the Rights of the Child reads: '[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'[32]. This is the most straightforward prohibition on such penalty in the entire body of IHRL, yet limited to a narrow category of prisoners. Be as it may, this prohibition is sufficiently strong to influence the interpretation of Art 7 ICCPR. In *Blessington and Elliot v. Australia*, the HRCttee considered the 30-year non-parole period for juveniles to be in contravention *inter alia* with Arts 7 and 10(3) ICCPR[33]. In particular, the Committee found that for life imprisonment to be compatible with ICCPR it must allow for 'a possibility of review' and 'a prospect of release'[34]. While this does not imply that release has to be granted in all circumstances, what matters is that 'release should not be a mere, theoretical possibility' and that the review mechanism should aim to 'evaluate the concrete progress made by the authors towards rehabilitation'[35]. In short, what must be granted to every juvenile subject to life imprisonment can be called 'right to hope'.

Surely, the prohibition on life imprisonment without prospect of release contained in the Convention on the Rights of the Child may have influenced the HRCttee's particular reading of Arts 7 and 10(3) ICCPR; however, the findings in this case – as in spite of their being tailored to juveniles – seem to be formulated in a way that makes it possible to extend them also to adults. If rehabilitation is a penalty's 'essential' aim that applies to anyone as established by Art 10(3), one may legitimately wonder how a non-parole prisoner can work for their own readmission in the society, if any effort made within the prison's walls does not assume any relevance for their release: hence the importance of review mechanisms and 'a prospect of release' also for adults. As one can easily infer, age does not ultimately seem a determining factor when the 'right to hope' is at stake.

[29] *Kang v. Republic of Korea*, Comm. No. 878/1999, 16 July 2003, para 7.2.
[30] *Van der Plaat v. the Netherlands*, Comm. No. 1492/2006, 22 July 2008, para 6.4.
[31] *Rameka and Others v. New Zealand*, Comm. No. 1090/2002, 6 November 2003.
[32] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Art 37. For a commentary on the *travaux préparatoires* of such instrument, see J. Tobin, *The UN Convention on the Rights of the Child: A Commentary*, Oxford, 2019, 1463 ff.
[33] *Blessington and Elliot v. Australia*, Comm. No. 1968/2010, 17 November 2014. For a commentary, see K. Fitz-Gibbon, *Life without Parole in Australia: Current Practices, Juvenile and Retrospective Sentencing*, in D. van Zyl Smit, C. Appleton, *Life Imprisonment and Human Rights*, Portland, 2016, 75 ff.
[34] *Blessington and Elliot v. Australia*, *supra* note 33, para 7.7. See also *Yong-Joo Kang v. Republic of Korea*, Comm. No. 878/1999, 16 July 2003, para. 2.3.
[35] *Blessington and Elliot v. Australia*, *supra* note 33, para 7.7.

An appropriate occasion for the HRCttee to clarify its stance on life imprisonment without prospect of release is represented by the pending case of *Albanese and Others v. Italy*[36], communicated to the Italian Government on April 2019. The applicants, all sentenced to the stricter form of life imprisonment envisaged by the Italian legal system, the so-called *ergastolo ostativo*[37], argue that subordinating release on license and access to several forms of reduction of sentence and alternatives to custody to cooperation with authorities runs contrary to Arts 7, 10(1) and 10(3) ICCPR. As will be shown below, the European Court of Human Rights has recently dealt with an analogous case: time will tell if the Committee and the Court are on the same page on this issue.

Recapitulating, for the moment one must remain cautious and not overestimate the HRCttee's case-law. First, albeit literally envisaged by the ICCPR as the 'essential' aim of punishment, rehabilitation has been left at the corner of the Committee's case-law: this may seem understandable, given the variety of penitentiary systems across States and the difficulty to establish whether the applicant was a specific victim of a State's failure to adopt or implement a rehabilitation-oriented model of punishment. Second, also the legal basis provided by Art 7 has not been interpreted so as to single out a 'right to hope' for individuals other than juveniles, even if no unsurmountable theoretical obstacles would show up in such case. Lastly, it seems that the potential contained in the reference to 'human dignity' as per Art 10(1) has been left largely unexploited so far.

3. The European Convention on Human Rights

Moving from the universal layer to the regional ones, the first system deserving close scrutiny is the European one. As has been briefly said, the European system – based on the European Convention on Human Rights (ECHR) – has considerably evolved in terms of punishments generally, and life imprisonment particularly. This success can be explained by taking into account, to name only one, the circumstance that out of forty-seven States party to the ECHR, forty-four establish a form of life imprisonment without prospect of release for serious crimes.

Albeit Art 3 ECHR does not contain any reference to 'punishments' unlike Art 7 ICCPR, for decades the ECHR's monitoring body, the European Court of Human Rights (ECtHR), has interpreted that provision so as to cover penalties. In the famous *Tyrer* case, the ECtHR held that the corporal punishment the applicant had been sentenced to (namely, three strokes of the birch) was contrary to Art 3 in that it contained a degree of 'humiliation' qualifying as 'degrading'[38]. Death penalty is also understood in quite similar terms today[39].

Moving on to life imprisonment without prospect of release, the first non-judicial pronouncements date back to the seventies, when an *ad hoc* Committee of

[36] G-RC/CCPR/19/ITA/1.
[37] See *amplius infra*.
[38] *Tyrer v. the United Kingdom*, App. No. 5856/72, 25 April 1978.
[39] *Al-Saadoon and Mufdhi v. the United Kingdom*, App. No. 61498/08, 2 March 2010.

the Council of Europe working on the treatment of long-term prisoners held that imprisoning a person for life 'without any hope of release' is 'inhuman'[40]. The Committee of Ministers subsequently adopted Recommendation Rec(2003)23 in which, albeit without condemning such penalty, it held that life sentences should aim to 'increase and improve the possibilities for [prisoners] to be successfully resettled in society and to lead a law-abiding life following their release'[41]. Moreover, the 2006 *European Prison Rules* – 'the most prominent soft-law instrument on prisoners' rights in Europe'[42] – provides a general framework on how to manage prisoners' contact with the external world in view of their rehabilitation[43].

As far as the European Court is concerned, the case-law on life imprisonment without prospect of release is remarkably rich. Any analysis cannot leave the fact out of consideration that such penalty has never been found to be itself a breach of Art 3[44] – an affirmation, one may say, carved in stone. Such finding, however, has not prevented the ECtHR from accepting the possibility 'that the imposition of an irreducible sentence may raise an issue' under Art 3 ECHR[45]. The Court then faced the issue in the *Léger v. France*[46] and *Kafkaris v. Cyprus*[47] cases, in both cases finding no violation of Art 3 ECHR as the respective penitentiary systems allowed for the reduction of the sanction after a given period of time. In other words, the applicants were not 'deprived of all hope of obtaining an adjustment of [their] sentence which was not irreducible *de jure* or *de facto*'[48]. It is important to focus our attention on two, intertwined aspects: the penalty's reducibility and the prisoner's hope to be readmitted in the society.

Reducibility *de jure* and *de facto* has become the key test for assessing the compatibility of life imprisonment without prospect of release with Art 3 ECHR: this is one of the main findings in the well-known case of *Vinter and Others v. the UK*[49]. Reducibility requires that mechanisms exist that allow for a review of the prisoner's progresses towards rehabilitation in the course of the sentence by domestic authorities[50]. As far as such mechanisms are concerned, the ECtHR has progressively honed its case-law. For example, it is now required that review

[40] European Committee on Crime Problems, Treatment of Long-Term Prisoners, 1977, 22.
[41] Committee of Ministers of the Council of Europe, Recommendation Rec(2003)23, Adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of the Ministers' Deputies, Appendix, para 2.
[42] See van Zyl Smit, Appleton, *supra* note 3, 206.
[43] Committee of Ministers of the Council of Europe, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006.
[44] Probably it has been first stated in *Kotälla v. the Netherlands*, App. No. 7994/77, Decision of 6 May 1978.
[45] *Einhorn v. France*, App. No. 71555/01, Decision of 16 October 2001, para 27.
[46] *Léger v. France*, App. No. 19324/02, 11 April 2006.
[47] *Kafkaris v. Cyprus*, App. No. 21906/04, 12 February 2008.
[48] *Léger v. France*, *supra* note 46, para 92.
[49] *Vinter and Others v. the United Kingdom* [GC], Apps. No. 66069/09 and others, 9 July 2013.
[50] *Ibidem*, para 119.

mechanisms be available after no more than 25 years of imprisonment[51], and, albeit States enjoy a margin of appreciation with respect to the form of such mechanisms, presidential release on compassionate grounds does not fall within the notion of review mechanism[52]. The criteria for review mechanisms to be ECHR-compliant are enlisted in *Murray v. the Netherlands*[53]: (*i*) they must be based on sufficiently clear and certain rules (principle of legality); (*ii*) they must aim to assess the continuing existence of a legitimate penological ground for detention, on the basis of an assessment of the prisoner's situation that must be actual and based on objective, pre-established criteria; (*iii*) they must be available not later than 25 years after the imposition of the sentence and thereafter a periodic review; (*iv*) they must be surrounded by adequate procedural safeguards; (*v*) they must be subject to judicial review. Generally, in the *Murray* case the Court stressed the importance of the 'individualization' and 'progression' principles to evaluate whether a life prisoner has a de facto prospect of release[54]. These are only some characteristics, which however give a thorough picture of the current state of the art[55].

As already argued, the purpose of review mechanism is to assess whether imprisonment is still justified in light of 'legitimate penological grounds': the ECtHR enumerates 'punishment, deterrence, public protection or rehabilitation' amongst them[56]. It follows that rehabilitation is considered just as one of the possible purposes of punishment, and not the 'essential' one, as the ICCPR goes[57]. However, one could hardly deny that the idea of rehabilitation as polar star of any penitentiary system is taking hold in the European case-law. In *Khoroshenko v. Russia*, for example, the Court argued against strict forms of life imprisonment in which prisoners are prevented 'from maintaining contacts with their families', which is believed to impinge upon 'their social reintegration and rehabilitation'[58]. More straightforwardly, the Court stated that while Art 3 ECHR does not impose a duty to provide rehabilitation programs on Contracting Parties, it requires to 'give life prisoners a chance, however remote, to someday regain their freedom',

[51] *Ibidem*. See also *T.P. and A.T. v. Hungary*, Apps. No. 37871/14 and 73968/14, 4 October 2016.
[52] *Öcalan v. Turkey (No. 2)*, Apps. No. 24069/03 and others, 18 March 2014. For a commentary, see J. D. Mujuzi, *A Prisoner's Right to be Released or Placed on Parole: A Comment on Öcalan v Turkey (No. 2) (18 March 2014)*, in 9 *Baltic Journal of Law and Politics* 69 (2016). See also *Petukhov v. Ukraine (No. 2)*, App. No. 41216/13, 12 March 2019.
[53] *Murray v. the Netherlands* [GC], App. No. 10511/10, 26 April 2016.
[54] See van Zyl Smit, Appleton, *supra* note 3, 210. See also *Khoroshenko v. Russia* [GC], App. No. 41418/04, 30 June 2015, Joint Concurring Opinion of Judges Pinto De Albuquerque and Turković, para 10 ('[t]he cornerstone of a penal policy aimed at resocialising prisoners is the individualized sentence plan, under which the prisoner's risk and needs in terms of health care, activities, work, exercise, education and contacts with the family and outside world should be assessed').
[55] For a subsequent case concerning the UK system, see *Hutchinson v. the UK* [GC], App. No. 57592/08, 17 January 2017, and for a commentary M. Pettigrew, *A Vinter retreat in Europe: Returning to the issue of whole life sentences in Strasbourg*, in 8 *New Journal of European Criminal Law* 128 (2017).
[56] See for instance *Kafkaris v. Cyprus*, *supra* note 47, para 92.
[57] See Art 10(3) ICCPR.
[58] *Khoroshenko v. Russia* [GC], App. No. 41418/04, 30 June 2015, para 144.

which implies that prisoners be given 'a proper opportunity to rehabilitate themselves'[59]. The Court again stressed the centrality of the rehabilitative purpose in *Dickson v. the UK*, in which it strongly supported the 'progression' principle: the more prisoners advance in serving their sentence, the more retribution should leave room for rehabilitation[60]. This explains why rehabilitation must be at the hearth of any review mechanisms[61]. This passage is of paramount importance as it clarifies that rehabilitation and prisoner's 'hope' are tightly connected.

Turning now to the second aspect, it is thanks to the ECtHR's case-law that a 'right to hope' has begun to surface in the IHRL debate on life imprisonment. This phrase has not officially entered the lexicon of the Court's decisions yet; only some judges in their separate opinions[62], in addition to scholarship[63], have resorted to it so as to elegantly capture an individual's fundamental right (not by chance deriving from Art 3 ECHR) in a short expression. In *Vinter*'s words, the 'right to hope' fundamentally consists in the prisoner's right 'to know, at the outset of his sentence, what he must do to be considered for release and under what conditions'[64]. As has been already argued, knowing the conditions for readmission in society plays a decisive role in the path for rehabilitation: hence the relevance of the 'right to hope' for the purposes of punishment.

Reducibility *de jure* and *de facto*, rehabilitation, 'right to hope': these are the basic coordinates guiding the ECtHR, to which in fact one more has to be added – 'human dignity'. In *Vinter*, after a comparative analysis of relevant national provisions and case-law the Court stated that 'the very essence' of the whole conventional edifice 'is respect for human dignity'[65], which requires that 'all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'[66]. At no point a clear definition of 'human dignity' is provided; after all, such notion is widely considered as the most controversial in IHRL precisely because of such

[59] *Harakchiev and Tolumov v. Bulgaria*, Apps. No. 15108/11 and 61199/12, 8 July 2014, para 264.
[60] *Dickson v. the UK*, App. No. 44362/04, 4 December 2007, para 28.
[61] *László Magyar v. Hungary*, App. No. 73593/10, 20 May 2014, para 58.
[62] See *Vinter and Others v. the UK*, *supra* note 49, Concurring Opinion of Judge Power-Forde.
[63] See Pinto de Albuquerque, *supra* note 11; K. Dzehtsiarou, *Is there Hope for the Right to Hope*, in *Verfassungsblog*, https://verfassungsblog.de/, 19 January 2017
[64] See *Vinter and Others v. the UK*, *supra* note 49, para 122.
[65] *Ibidem*, para 113.
[66] *Ibidem*, para 114.

reticence[67]. It has been labeled, in turn, as 'suspect'[68], 'vacuous'[69], even 'dangerous'[70].

Leaving conceptual hurdles aside, 'human dignity' has acquired a certain weight in the ECtHR's case-law on life imprisonment, as witnessed by the recent *Viola v. Italy (No. 2)* case[71]. The applicant had been sentenced to life imprisonment for Mafia-related offenses (murder, abduction, unlawful possession of firearms) and, after six years of special prison regime pursuant to section 41bis of Law No. 354 of 26 July 1975 ('Ordinamento Penitenziario' or Prison Administration Act, hereinafter OP), had applied for prison leave on two occasions, both unsuccessfully. The applicant was subject to the *ergastolo ostativo* regulated by Art 22 of the Italian Criminal Code and sections 4bis and 58ter OP. In brief, according to such provisions release on license and access to several forms of reduction of sentence and alternatives to custody are precluded for prisoners that do not cooperate fruitfully with judicial authorities – a measure clearly aiming at severing all relations between members of Mafia groups[72]. Such normative framework, which essentially subordinates penitentiary benefices to judicial cooperation, does not give any relevance to the following circumstances: first, a prisoner may decide not to cooperate because of the fear of reprisals, either against next-to-kin outside the prison or against himself; second, a prisoner may find himself in the condition of not being able to cooperate due to its intimate certainty of being innocent – yet rarely, cases of miscarriage of justice occur.

In addition to this, there exists at least one precedent in the ECtHR's case-law, namely the *Trabelsi* case[73]. The applicant, at that time resident in Belgium, had been sentenced to life imprisonment in the US and then extradited by the Belgian authorities upon an arrest warrant. The US authorities had agreed to some requests, such as the non-enforcement of the death penalty and a possibility of commutation of a life sentence. Still, one of the conditions for accessing review mechanisms was 'substantial cooperation' with judicial authorities[74]: to the Court

[67] On the reflection on human dignity from a IHRL perspective, see: P. De Sena, *Dignità umana in senso oggettivo e diritto internazionale*, in *Diritti umani e diritto internazionale*, n. 1/2017, 573; C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, in 19 *European Journal of International Law* 655 (2008); P. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, in 19 *European Journal of International Law* 931 (2008).

[68] P. Martens, *Encore la dignité humaine : réflexions d'un juge sur la promotion par les juges d'une norme suspecte*, in AA. VV., *Les droits de l'homme au seuil du troisième millénaire : mélanges en hommage à Pierre Lambert*, Bruxelles, 2000, 561.

[69] M. Bagaric and J. Allan, *The Vacuous Concept of Dignity*, in 5 *Journal of Human Rights* 257 (2006).

[70] *Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01, 25 January 2007, Dissenting Opinion of Judges Spielmann and Jebens, para 9.

[71] See *supra* note 9.

[72] 'Impossible' or 'unenforceable' cooperation, as well as situations in which prisoners can demonstrate that they have severed all links with organized criminality are excluded and give access to the penitentiary benefits. On this form of life imprisonment, see E. Dolcini, *La pena detentiva perpetua nell'ordinamento italiano. Appunti e riflessioni*, in *Diritto Penale Contemporaneo – Rivista Trimestrale*, n. 3/2018, 1.

[73] *Trabelsi v. Belgium*, App. No. 140/10, 4 September 2014.

[74] *Ibidem*, para 134.

this was not enough to comply with Art 3 ECHR as it did not attach sufficient importance to the prisoner's progresses[75].

In the same line, the *ergastolo ostativo* does not attach importance to any progress towards rehabilitation that non-cooperating prisoners may make. These findings push the ECtHR to spot a radical contrast between this form of life imprisonment without prospect of release (absent cooperation) and 'human dignity': requesting that prisoners cooperate also in cases where the authenticity of such cooperation is doubtful runs counter the individual's auto-determination and thus their dignity[76]. Put it in another way, the *ergastolo ostativo* is not reducible – at least *de facto* – as it places an excessively heavy burden on the perspective of a prisoner's release[77].

To conclude, this last case is telling as it vividly demonstrates how far the European case-law has pushed itself: the notion of 'human dignity' has evidently acted as an important driver in this sense. This is all the more remarkable if one considers that contrary to the ICCPR the ECHR does not contain any written provision resorting to 'human dignity'. However, possibly by virtue of the more limited number of States party to a regional instrument and the widespread resort to life imprisonment by almost all European States, the progresses made by the ECHR system towards a better understanding of human-rights implications of such penalty are exemplary.

4. The American Convention on Human Rights

In the American continent the most prominent IHRL instrument is the American Convention on Human Rights (ACHR)[78]. Art 5 establishes the right to 'humane treatment', which comprises the respect of personal integrity, the prohibition on torture and other inhuman or degrading treatment and punishment, and – unlike Art 3 ECHR – specific provisions for those who are deprived of their personal liberty. With respect to punishment, in line with Art 10(3) ICCPR, Art 5(6) ACHR reads that 'punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners'. Again, Art 5(2) parallels Art 10(1) ICCPR in that it dictates that all person deprived of their personal liberty 'shall be treated with respect for the inherent dignity of the human person'.

Soft-law instruments restate such imperatives. The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* are based on the key conception that punishments aim to the 'reform, social re-adaptation and personal rehabilitation' of prisoners[79]. Several provisions contained therein

[75] *Ibidem*, para 137.
[76] *Viola v. Italy (No. 2)*, *supra* note 9, paras 113 and 136.
[77] *Ibidem*, para 137.
[78] Organization of American States (OAS), American Convention on Human Rights, Costa Rica, 22 November 1969.
[79] Inter-American Commission on Human Rights, Resolution No. 1/08, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, 13 March 2008, Preamble.

emphasize the need for rehabilitation programs and more generally for the respect of prisoners' inherent dignity, with a particular focus on living conditions in prisons[80].

Moving to the judiciary practice, it is noteworthy that Art 5(6) has been employed by the Inter-American Court of Human Rights (IACtHR) to argue that the purpose of rehabilitation has to be well present both at the moment of establishing a given penalty (thus addressing States' law-making bodies) and at the moment of convicting an individual (thus addressing the judiciary)[81]. In the same vein, in some cases the Court has ruled that violations of personal integrity and of the prohibition on inhuman and degrading punishment give rise to situation that are plainly contrary to rehabilitation[82]. In other words, focus is mostly on prison living standards (such as assistance and access to productive activities)[83]: if these are wanting, the path towards readmission in society will be easily jeopardized.

The issue of life imprisonment has been tackled in a recent case involving juveniles in Argentina, where criminal legislation allows for life imprisonment with the possibility of parole only after twenty years in prison. In the *Mendoza* case, the Inter-American Commission held in 2010 that Argentina had violated, among others, not only the provisions on special protection of children (Art 19) and against arbitrary detention (Art 7), but also 5(6) 'read in combination' with Art 19 ACHR[84]. Like the *Blessington and Elliot* case analyzed above[85], a key role has been played by the UN Convention on the Rights of the Child as a specific normative framework for interpreting ACHR's provisions. Later, the IACtHR addressed the same topic – for the first time since its establishment[86] – holding that 'life imprisonment and reclusion for life do not achieve the objective of social reintegration of juveniles'[87]. What is more, the Court added that due to its functioning 'in a purely retributive sense' this penalty results in rehabilitation being 'annulled to [its] highest degree'[88]. On the one hand, one could extend such line of reasoning also to adults, as already argued with respect to the analogous HRCttee case. On the other hand, one must not forget that the Court adopts a proportionality-based reasoning: life imprisonment is understood as 'disproportionate' with respect to the sole objective of sanctioning a minor.

[80] For more on the Principles, see F. J. de Leon Villalba, *Imprisonment and Human Rights in Latin America: An Introduction*, in 98 *The Prison Journal* 17 (2018).
[81] *Lori Berenson-Mejia v. Peru*, Series C No. 128, 23 June 2005, para 101; *García Asto and Ramírez Rojas v. Peru*, Series C No. 137, 25 November 2005, para 223.
[82] *Penal Miguel de Castro Castro v. Peru*, Series C No. 178, 25 November 2006, para 314.
[83] See Inter-American Commission on Human Rights, *Report on the situation of persons deprived of liberty in the Americas*, 31 December 2011, OAS/Ser.L/V/II.Doc 64, para 608; see also B. López Lorca, *Life imprisonment in Latin America*, in van Zyl Smit, Appleton, *supra* note 33, 63.
[84] *César Alberto Mendoza et al. v. Argentina (Merits)*, Case 12.651, Report No. 172/10.
[85] See *supra* note 33.
[86] See Bernaz, *supra* note 6, 488.
[87] *Mendoza and others v. Argentina*, Series C No. 260, 14 May 2013, para 163.
[88] *Ibidem*, para 166.

Whether this proportionality assessment varies and produces different results when applied to non-juveniles remains an open question.

Unfortunately, to the writer's best knowledge there are no other cases decided by the Court on the issue of life imprisonment in general, let alone without prospect of release. Two are the plausible reasons. First, such penalty is present only in a limited number of States party to the ACHR (Mexico, on a state level; Argentina, Chile and Honduras – where life sentences can be reviewed –; Cuba and Peru – where they can be reviewed on a limited basis), a circumstance that makes Latin America 'not only a de facto death penalty free zone but also a life imprisonment almost-free zone'[89]. Second, life imprisonment seems to be overshadowed by other penological issues that are perceived as more pressing in Latin America, such as structural shortcomings in the penitentiary systems (overcrowding; poor living conditions; ill-treatments; incommunicado detentions; torture) resulting in systemic violations of human rights[90]. As an example, the *Pacheco Teruel* case contains a wide array of positive measures that States are requested to adopt in order to guarantee adequate standards of treatment in prison and thus to facilitate prisoners' rehabilitation[91].

However, one must not be misled by the fact that life imprisonment without prospect of release is absent in most legal systems of States Party to the ACHR. As a matter of fact, maximum penalties tend to be much higher (ranging from 20 to 60 years) than, for instance, those established by most European States' criminal codes: Latin America's long-term imprisonment often is a *de facto* life imprisonment[92]. Given that the minimum terms to be served before being considered for conditional release in Latin American States is about two-thirds of the sentence[93], the fact that any reflection on the 'right to hope' is missing is worrisome[94].

In sum, the connections among the purpose of rehabilitation and the right to humane treatment have not been explored sufficiently yet. A sound reflection on the need for a real possibility of parole or release as a cornerstone for the path towards rehabilitation – the European 'right to hope' – is still missing in the American continent.

5. The African Charter on Human and Peoples' Rights

Adopted in 1981 by the then Organization of African Unity (later replaced by the African Union), the African Charter on Human and Peoples' Rights (ACHPR)[95] contains a key provision against all forms of inhuman or degrading treatments.

[89] See de Leon Villalba, *supra* note 80, 26.
[90] See López Lorca, *supra* note 83, 66.
[91] *Pacheco Teruel and Others v. Honduras*, Series C No. 241, 27 April 2012, para 67.
[92] For numbers and figures, see the thorough analysis of F. J. de Léon Villalba, *Long-term Imprisonment in Latin America*, in van Zyl Smit, Appleton, *supra* note 33.
[93] *Ibidem*, 342.
[94] *Ibidem*, and López Lorca, *supra* note 83, 63.
[95] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5.

Art 5 ACHPR reaffirms any individual's right 'to the respect of the dignity inherent in a human being' and prohibits 'all forms of … degradation of man', including torture and inhuman or degrading punishment. Early drafts of this provision were far more detailed; for instance, the so-called *M'Baye Draft* explicitly provided for the rehabilitative purpose of punishments[96], in line with Art 5(6) ACHR and Art 10(3) ICCPR.

Turning to the jurisprudential application of this provision, focus is mainly on corporal punishments. The ACHPR's monitoring bodies – the Commission and the Court[97] – have repeatedly addressed the issue, holding for instance that penalties consisting of lashes with a whip were contrary to Art 5 ACHPR[98]. Shari'a punishments are on the agenda as well[99]. More generally, it has been stated that States do not enjoy a 'right' to punish individuals in a way that contradicts their inherent dignity of individuals[100].

When it comes specifically to life imprisonment, pronouncements by the two monitoring bodies are totally absent. Only (and in passing) the Commission's Special Rapporteur on Prisons – thus completely outside any contentious or judiciary procedures – noted that 'measures such as parole, judicial control, reductions of sentences, community service, diversion, mediation and permission to go out should also be developed'[101]. As a result, commentaries globally neglect the issue, or dedicate cursory remarks thereto[102].

A possible explanation for the general indifference towards life imprisonment without prospect of release may be found in analogy with our previous remarks on the Inter-American system. First, much attention has been paid to prison living conditions, an issue which is globally perceived as more impelling: there have been numerous cases concerning, to name only few, denial of basic facilities[103], excessive solitary confinement[104], methods of 'rigorous interrogation' and 'torture'[105]. Second, unlike other IHRL instruments the ACHPR also lacks an explicit provision – either in the convention itself or in an

[96] Draft African Charter on Human and Peoples' Rights, prepared for the Meeting of Experts in Dakar, 28 November – 8 December 1979, by K. M'baye, CAB/LEG/67/1.
[97] For an overview of the institutional framework of the African system, see *amplius* G. Pascale, *La tutela internazionale dei diritti dell'uomo nel continente africano*, Naples, 2017, and G. J. Naldi, *The African Union and the Regional Human Rights System*, in M. Evans, R. Murray (eds), *The African Charter on Human and Peoples' Rights: the system in practice*, 2nd ed, Cambridge, 2008.
[98] African Commission on Human and Peoples' Rights, *Doebbler v. Sudan*, Case No. 235/2000, 25 November 2009.
[99] *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000, 25 November 2009.
[100] *Ibidem*, para 42.
[101] Special Rapporteur on Prisons and Conditions of Detention in Africa, Prisons in Cameroon: Visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 2-15 September 2002, ACHPR/37/OS/11/437.
[102] See R. Murray (ed), *The African Charter on Human and Peoples' Rights: A Commentary*, Oxford, 2019, 161-162.
[103] *John D. Ouko v. Kenya*, Comm. No. 232/99, 23 October – 6 November 2000.
[104] *Krischna Achutan (On Behalf of Aleke Banda), Amnesty International (On Behalf of Orton and Vera Chirwa), Amnesty International (On Behalf of Orton and Vera Chirwa) v. Malawi*, Comms. No. 64/92, 68/92, 78/92, 7th ACHPR AAR Annex IX (1993–1994).
[105] *Huri-Laws v. Nigeria*, Comm. No. 225/98, 6 November 2000.

additional protocol – against death penalty: the Commission urged States to 'envisage a moratorium' to such punishment in 1999[106], and then tackled the issue on few occasions, but generally it has always declined to make strong statements against it[107]. While the majority of States party to the ACHPR retain the capital punishment, a small number (e.g. Kenya in 2003 and more recently Benin) of them has commuted death sentences to life imprisonment[108]: in such context, a logic of 'lesser evil' – albeit legally unacceptable in principle, as what is at stake are fundamental, absolute and non-derogable rights[109] – seems to kick in.

However, the fact remains that life imprisonment without prospect of release is a problematic issue in some States Party to the ACHPR's domestic (and mostly constitutional) law, such as South Africa[110], Mauritius[111] and Malawi[112]. On the contrary, the regional system of protection of human rights still needs time to mature, but one may already see a good start in existing case-law, for a twofold reason. First, the ACHPR contains a strong reference to 'human dignity', a concept which some scholars have deeply studied with respect to the African continent. Reflections on notions such as that of 'Ubuntu' – a term for 'humanity' elaborated during Zimbabwe's independence struggle – animate not only the philosophical and political discourse[113], but also the legal one: this notion attributes high and equal value – 'dignity' – to each person inasmuch as part of a community. It has also been resorted to by domestic judiciaries[114]. Second, it is noteworthy that the African Commission has interpreted the phrase 'cruel, inhuman and degrading treatment' as per Art 5 ACHPR as including also 'actions … which humiliate the individual or force him or her to act against his will or conscience'[115]. If this is the case, then, for instance, requiring prisoners to cooperate against their own will in order to access penitentiary benefits, as occurred in the *Viola* case, may easily meet the requirement set forth by the Commission.

[106] African Commission on Human and Peoples' Rights, Resolution Urging the State to Envisage a Moratorium on the Death Penalty, ACHPR/Res.42 (XXVI) 99.
[107] See B. Manby, *Civil and Political Rights in the African Charter on Human and Peoples' Rights: Articles 1-7*, in Evans, Murray, *supra* note 97, 189 ff.
[108] *Ibidem*, 190. See also M. Ssenyonjo, *Responding to Human Rights Violations in Africa. Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)*, in 7 *International Human Rights Law Review* 1 (2018), 24 ff.
[109] To confine ourselves to the Commission's case-law, see *Gabriel Shumba v. Zimbabwe*, Comm. No. 288/04, 2 May 2012, para 142 (taking an 'uncompromising stand against torture').
[110] See Mujuzi, *supra* note 52, 80 ff.
[111] See J. D. Mujuzi, *The Evolution of the Meaning(s) of Penal Servitude for Life (Life Imprisonment) in Mauritius: The Human Rights and Jurisprudential Challenges Confronted So Far and Those Ahead*, in 53 *Journal of African Law* 222 (2009).
[112] See E. Gumboh, *A Critical Analysis of Life Imprisonment in Malawi*, in 61 *Journal of African Law* 443 (2017).
[113] J. W. T. Samkange, *Hunhuism or Ubuntuism: a Zimbabwe indigenous political philosophy*, Philadelphia, 1980; D. Tutu, *No Future without forgiveness*, London, 1999.
[114] Equality Court of Johannesburg (South Africa), *Afri-Forum and Another v. Malema and Others* (20968/2010), 12 September 2011 (in a hate speech trial).
[115] *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria*, Comms. No. 137/94, 139/94, 154/96 and 161/97, 31 October 1998, para 79.

6. Concluding Discussion

Ensuring that life prisoners have a 'prospect of release' seems not only appropriate in penological terms, but also consistent with what their inherent dignity – something that is not washed away even by the most heinous crimes – demands. The proposed IHRL comparative approach to life imprisonment without prospect of release allows for the identification of some common traits and differences between the main international instruments aiming to the protection of human rights. Let us face them in turn.

As for the latter ones, it is impossible not to spot a radically diverse approach to the issue. The rehabilitative purpose of penalties is strongly affirmed in those systems – such as the ICCPR, the ACHR, the ACHPR – in which the life prisoners' 'right to hope' for their readmission in society strives more to get affirmed and to acquire conceptual autonomy from the more general right not to be subject to inhuman or degrading punishment – which happens with respect to the ECHR. As a matter of fact, the European reflection on the issue is rich in pronouncements that have gradually shaped this right: review mechanisms must be in place that ensure adequate substantial and procedural safeguards, and thus an effective – and not merely abstract – 'prospect of release' for life prisoners. Reducibility *de jure* and *de facto* goes on a par with the purpose of rehabilitation. In sum, the 'right to hope' is truly a 'European' one[116].

One reason explaining such 'multi-speed' approach to life imprisonment across IHRL instruments is the relevance of this penalty in the public debate: Europe stands as a death penalty-free and life imprisonment-friendly zone, while in the American continent (with the major exception of the US and Canada) life imprisonment is provided only by few States, and in the African continent capital punishment and corporal ones remain on top of the human rights agenda. Incidentally, one may add that also in the Asian continent life imprisonment, especially in its harshest forms, is an issue: India and China have recently adopted it as a formal statutory sanction, while only few States have prohibited it altogether (such as East Timor).

As for the commonalities, all the instruments tackle the issue from the standpoint of the prohibition on torture, cruel, inhuman and degrading punishments or more generally treatments: life imprisonment, yet severe, is not considered to infringe such prohibition in itself, as States maintain a wide margin appreciation in matters of criminal policy. They are basically free to establish this penalty for criminal acts, provided that the proportionality requirement between offence and penalty is met[117], and with the exception of minors (to whom specific IHRL provisions apply). Either in treaty provisions or thanks to monitoring bodies' jurisprudence, rehabilitation is considered at the core of penalties' purposes at least on a par with other purposes: it follows that a penalty in which rehabilitation is not given importance – altogether or sufficiently, as happens when

[116] See Pinto de Albuquerque, *supra* note 11.
[117] For more on proportionality in the relationship between offence and penalty, see van Zyl Smit, Appleton, *supra* note 3, 126 ff.

no concrete prospect of release is ensured and thus when prisoners have no incentive to work for their rehabilitation – is in contravention with all the IHRL instruments analyzed above.

A further touchpoint among these instruments lies in their reference to 'human dignity'. This is a key concept as: (*i*) it is expressly mentioned in the ICCPR, the ACHR, and the ACHPR and, yet with minor differences, systematically placed before the provision against inhuman and degrading punishments and on rehabilitation; (*ii*) in spite of its being absent in the ECHR, it has been resorted to by the ECtHR to advance its jurisprudence on life imprisonment without prospect of release, namely to argue that subordinating penitentiary benefices to judicial cooperation does not ensure *de facto* reducibility of life sentences and thus qualifies as a treatment proscribed by Art 3 ECHR. Contrary to the ECtHR, other monitoring bodies have not relied on 'human dignity' to enhance their understanding of both the prohibition on inhuman and degrading treatments and the rehabilitative purpose of penalties. As has been observed, 'human dignity' has gained more traction in some States' constitutional-law jurisprudence[118].

In closing, it is safe to argue that, yet taking into account the structural divergencies and the 'multi-speed' approach explained above, life imprisonment without prospect of release exists as an open issue under current IHRL: somewhere it is felt as topical, somewhere else it is overshadowed by more pressing needs. In all cases, it is certain that what has been labeled a '*laissez-faire* approach'[119] with respect of sentencing in criminal law is experiencing a gradual, but tangible, process of rethinking at the international level, and human rights bodies are playing a leading role in it. This short contribution has demonstrated that life imprisonment without prospect of release is an apt test bench for this process.

[118] See G. de Beco, *Life sentences and human dignity*, in 9 *The International Journal of Human Rights* 411 (2005) 414 ff. (citing German and South African cases).
[119] See Bernaz, *supra* note 6, 496.