SEPARATE OPINION

OF

JUDGE RAFAA BEN ACHOUR

1. I agree with the grounds and the operative part of the Court's judgment in *Moses Amos Mwakasindile v. United Republic of Tanzania* (Application No. 045/2019).

2. I would like to emphasise in this separate opinion that the Applicant was arrested and sentenced by Tanzanian courts to life imprisonment for drug trafficking, in this case, *Catha edulis* (khat).

3. The record shows that the Applicant was arrested while travelling on a bus. He was suspected of transporting khat, which is considered a prohibited drug under the Respondent State's Drugs and Prevention of Illicit Traffic of Drugs Act. The substance was found on the back seat during a snap check conducted by the police, leading to the arrest of the Applicant, who was suspected of being the owner.

4. This separate opinion seeks to clarify two points which, in my view, deserve to be highlighted. Firstly, the life sentence imposed on the Applicant is manifestly disproportionate to the nature of the offence (I). Secondly, a life sentence without any possibility of review raises serious concerns in relation to international standards prohibiting inhuman and degrading punishment (II).

I. On the lack of proportionality between the offence and the sentence

5. Unfortunately, the Court did not take into account the glaring disproportion between the sentence imposed on the Applicant and the offence with which he was charged.

6. While khat is undoubtedly a psychotropic substance, it is nonetheless not one of the most dangerous drugs that are internationally prohibited and severely punished, such as heroin, opium or cocaine.

7. Khat is an evergreen flowering shrub grown in East Africa and the south-west of the Arabian Peninsula. It contains cathinone and cathine. Its effect is similar to that of amphetamines. It relieves fatigue and hunger.

8. Khat has been used since time immemorial; its fresh leaves are chewed. It is widely used mostly in Djibouti, Somalia, Yemen and Oman, but also in Ethiopia and Madagascar.

9. Khat is not subject to international control. However, it is listed as a narcotic drug by some UN member states. While the plant itself is not listed in the United Nations Single Conventions on Narcotic Drugs, its active ingredients, cathinone and cathine,[1] are listed in Tables I and IV respectively of the United Nations Convention on Psychotropic Substances adopted in Vienna on 21 February 1971. Having been studied several times by the Expert Committee on Drug Dependence (ECDD)[2] of the World Health Organisation (WHO), *Catha edulis* is not an internationally controlled substance. It is considered to have a low risk of addiction.[3]

10. The legal status of khat can vary considerably from one country to another. While it is illegal in most European countries and in the United States, it is traditional and legal in the Horn of Africa and in parts of the Arabian Peninsula, especially Yemen. Ignorance of the law in a transit or destination country does not absolve one from criminal liability.

11. With regard to the punishment for possession, consumption or transport of khat, custodial sentences never exceed ten years' imprisonment for the most serious

[1] Cathinone and cathine are central nervous system (CNS) stimulants but are less potent than amphetamine.
[2] The Expert Committee on Drug Dependence is an independent scientific advisory group to the World Health Organisation (WHO) that evaluates psychoactive substances and their potential for abuse and guides global drug policy. It has played a key role in the global drug control system since 1949.
[3] "The Committee reviewed the data on khat and determined that the potential for abuse and dependence is low. The level of abuse and threat to public health is not significant enough to warrant international control. Therefore, the Committee did not recommend the scheduling of khat". WHO Expert Committee on Drug Dependence, 34th Report, 2006

cases. In the *Vinter and Others v. the United Kingdom* judgment of 9 July 2013, the European Court, recalling that state freedom remains the rule when it comes to choosing a criminal justice system, emphasised the margin of appreciation of states, which is particularly wide in this case. Only '*clearly disproportionate*' penalties will be deemed contrary to Article 3 of the European Convention.[4]

12. With regard to khat, by way of illustration, in France,[5] the mere consumption of khat is an offence punishable by one year's imprisonment and a fine of €3,750**.** To simplify the procedure, law enforcement officers may impose a fixed fine of €200 for drug use (reduced to €150 in the event of prompt payment), although heavier penalties may still be imposed by a judge. Trafficking and possession of large quantities carry much more severe penalties for trafficking (possession, acquisition, transfer, transport, etc.), up to 10 years' imprisonment and hefty fines. Importation and exportation are also prohibited and severely punished.

13. From the foregoing, it emerges that khat is not one of the most dangerous psychotropic substances and that, in the absence of aggravating circumstances, penalties for its use are not very severe.

14. In the case that is the subject of this opinion, it is clear that the penalty of life imprisonment is completely out of step with criminal legislation in most countries. It would have been desirable for the Court to adopt an *obiter dictum*

---

[4] See: Quilhas Daniela, « L'arrêt Vinter et autres contre Royaume-Uni, une condamnation de l'incompressibilité des peines perpétuelles », Sentinelle internationale, Bulletin n° 359, https://www.sentinelle-international.com/node/114

[5] Article 3421 of the Public Health Act

"The illicit use of any substance or plant classified as a narcotic is punishable by one year's imprisonment and a fine of €3,750.

If the offence is committed in the course of or in connection with the performance of their duties by a person holding public authority or entrusted with a public service mission, or by an official of a road, rail, rail, sea or air transport company, goods or passengers performing duties involving transport safety, the list of which is set by decree of the Council of State, the penalties are increased to five years' imprisonment and a fine of €75,000. For the purposes of this paragraph, workers made available to the transport company by an outside company shall be treated as employees of the transport company.

For the offence referred to in the first paragraph of this article, including in the event of a repeat offence, public proceedings may be terminated, under the conditions set out in Articles 495-17 to 495-25 of the Code of Criminal Procedure, by the payment of a fixed fine of €200. The amount of the reduced fixed fine is €150 and the amount of the increased fixed fine is €450.

in its decision in order to draw the Respondent State's attention to the Draconian severity of its legislation and to its disproportionate and anachronistic nature.

II. On the inhuman and degrading nature of life imprisonment

15. The issue of life imprisonment and its compatibility with human rights is the subject of significant international legal debate. In countries that have abolished the death penalty, it has become the alternative punishment. However, even in these cases, it has not escaped criticism. Some see it as "programmed despair". The dominant view is that life imprisonment is only compatible with human rights *if it is reducible*, that is, if it offers a real prospect of release.

16. Unlike Article 3 of the European Convention, the African Charter on Human and Peoples' Rights does not contain an express provision prohibiting States from practising torture or subjecting persons within their jurisdiction to inhuman or degrading treatment or punishment. However, Articles 4 and 5 of the Charter, which deal respectively with the inviolability of the human being and the right to respect for the inherent dignity of the human being, in the light of the United Nations Convention against torture and cruel, inhuman and degrading treatment, achieve the same result. Inhuman and degrading penalties, such as life imprisonment without parole, constitute violations of these articles.

17. In the *Vinter and Others v. the United Kingdom* judgment of 2013,[6]the Grand Chamber of the European Court of Human Rights ruled that, in order to be compatible with Article 3, a life sentence without parole must be subject to review, thereby offering the convicted person a realistic chance of release.[7] In the *Bodein*

[6] Grand Chamber, *Vinter and Others v. the United Kingdom*, Applications Nos. 660069, 13/10, 3896/10, 9 July 2013. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-122694%22]}

[7] "The Court reiterates that Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. […] In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3 .
[…]

v. France judgment of 2014,[8] the same Court upheld the French system of "*perpetuité incompressible*" (life imprisonment without parole), considering that even if the conditions for review are strict and occur after a very long period of time, they do not exclude any possibility of release, thus preserving the "right to hope". This means that domestic law must provide for a sentence review mechanism that allows the competent authority to determine whether the prisoner's progress and public safety requirements justify parole.[9] The total absence of any prospect of release, or even a purely formal and ineffective prospect of release, is considered inhuman and degrading treatment.

18. In short, prisoners, including those sentenced to life imprisonment, retain their fundamental rights, except for the limitations inherent in the deprivation of liberty, and must be given the prospect of rehabilitation and reintegration, even if distant, in order for their sentence to comply with international human rights standards.

19. For all these reasons, it would have been appropriate for the Court to consider the two issues raised in this opinion.

Judge Rafaâ Ben Achour

For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds,".

[8] Fifth Section, *Case Bodein v. France*, *(Application no. 40014/10),* 13 November 2014. https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-147880%22]}

[9] "With regard to life sentences, Article 3 must be interpreted as requiring that they be compressible, that is to say, subject to review enabling the national authorities to examine whether, during the course of the sentence, the prisoner has changed and progressed so much on the path to rehabilitation that there are no longer any legitimate penal reasons for keeping him or her in detention.

[…]

Applying the principles established in the *Vinter* judgment, the Court recently ruled that the mere prospect of release on humanitarian grounds, or a presidential pardon in the form of a pardon - without the prisoner knowing what he had to do to be considered for release and what the applicable conditions were - are not effective mechanisms for reviewing sentences that allow for the progress made by life prisoners to be taken into account (*Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 203, 18 March 2014, and *László Magyar v. Hungary*, no. 73593/10, §§ 57-58, 20 May 2014).