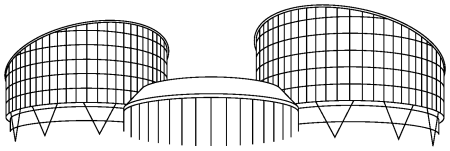

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF KHAMTOKHU AND AKSENCHIK v. RUSSIA

(Applications nos. 60367/08 and 961/11)

JUDGMENT

STRASBOURG

24 January 2017

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Khamtokhu and Aksenchik v. Russia,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
András Sajó,
Işıl Karakaş,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Khanlar Hajiyev,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki,
Ksenija Turković,
Dmitry Dedov,
Branko Lubarda,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
Gabriele Kucsko-Stadlmayer, *judges,*
and Roderick Liddell, *Registrar,*

Having deliberated in private on 20 April and 17 October 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in two applications (nos. 60367/08 and 961/11) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Russian nationals, Mr Aslan Bachmizovich Khamtokhu and Mr Artyom Aleksandrovich Aksenchik ("the applicants"), on 22 October 2008 and 11 February 2011 respectively.

2. The applicants were represented by Ms N. Yermolayeva, Ms A. Maralyan, Ms E. Davidyan and Ms K. Moskalenko, lawyers practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights.

3. The applicants, who had been sentenced to life imprisonment, complained that they were subjected to discriminatory treatment *vis-à-vis* certain other categories of convicted offenders who were exempt from life imprisonment by operation of law.

4. The applications were allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 September 2011 a Chamber of that Section decided to give notice of the above complaints to the Government and declared the remainder of the applications inadmissible. On 13 May 2014 a Chamber of that Section, composed of Isabelle Berro-Lefèvre, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković, and Dmitry Dedov, judges, and also of Søren Nielsen, Section Registrar, decided to join the proceedings in the applications (Rule 42 § 1) and declared the case partly admissible. On 1 December 2015 a Chamber of the former First Section, composed of András Sajó, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turković, and Dmitry Dedov, judges, and also of André Wampach, Deputy Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. At the final deliberations, André Potocki, substitute judge, replaced Julia Laffranque, who was unable to take part in the further consideration of the case (Rule 24 § 3).

6. The applicants and the Government each filed further written observations (Rule 59 § 1) on the merits. In addition, third-party comments were received from Equal Rights Trust, a non-governmental organisation based in London, the United Kingdom, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr G. MATYUSHKIN, the Representative of the Russian Federation to the European Court of Human Rights,
Ms O. OCHERETYANAYA, *Adviser*;

(b) *for the applicants*
Ms A. MARALYAN,
Ms N. YERMOLAYEVA,
Ms E. DAVIDYAN, *Counsel*,
Ms K. MOSKALENKO, *Adviser*.

The Court heard addresses by Ms Maralyan, Ms Yermolayeva, Ms Davidyan and Mr Matyushkin, and their answers to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, Mr Khamtokhu and Mr Aksenchik, were born in 1970 and 1985 respectively. They are currently serving life sentences in the Yamalo-Nenetskiy Region of Russia.

A. Criminal proceedings against the first applicant

9. On 14 December 2000 the Supreme Court of the Adygea Republic found the first applicant guilty of multiple offences, including escape from prison, attempted murder of police officers and State officials, and illegal possession of firearms, and sentenced him to life imprisonment.

10. On 19 October 2001 the Supreme Court of the Russian Federation upheld the first applicant's conviction on appeal.

11. On 26 March 2008 the Presidium of the Supreme Court of the Russian Federation quashed the appeal judgment of 19 October 2001 by way of supervisory review and remitted the matter for fresh consideration.

12. On 30 June 2008 the Supreme Court of the Russian Federation upheld the first applicant's conviction on appeal. The court reclassified some of the charges against him but the life sentence remained unchanged.

B. Criminal proceedings against the second applicant

13. On 28 April 2010 the Tomsk Regional Court found the second applicant guilty on three counts of murder and sentenced him to life imprisonment.

14. On 12 August 2010 the Supreme Court of the Russian Federation upheld that conviction on appeal.

II. RELEVANT DOMESTIC LAW

A. Criminal law

15. The 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) provided that capital punishment could not be imposed on anyone below the age of 18 or on a woman who was pregnant either at the time of the offence or at the time of judgment (Article 23). The alternative to the death sentence was fifteen years' imprisonment. There was no provision for life imprisonment.

On 29 April 1993 the RSFSR Criminal Code was updated and the exemption from capital punishment in Article 23 was extended to all women, and to young offenders and offenders aged 65 or over.

The Criminal Code of the Russian Federation, which has replaced the RSFSR Criminal Code since 1 January 1997, adopted a more detailed inventory of penalties. It provides for up to twenty years' imprisonment (Article 56), life imprisonment (Article 57) and capital punishment (Article 59). Women, young offenders below the age of 18 and offenders aged 65 or over are exempted, in identical terms, from both life imprisonment and capital punishment (Articles 57 § 2 and 59 § 2). By way of a pardon, capital punishment can be commuted to life imprisonment or twenty-five years' imprisonment (Article 59 § 3). In 2009 the Constitutional Court imposed an indefinite moratorium on capital punishment in Russia (for the text of the decision, see *A.L. (X.W.) v. Russia*, no. 44095/14, § 51, 29 October 2015).

16. Article 57 ("Life imprisonment") reads as follows:

> "1. Life imprisonment may be imposed for particularly serious offences against life and ... public safety.
>
> 2. Life imprisonment may not be imposed on women, persons who were under eighteen years of age at the time they committed the offence or men who were sixty-five or older at the time the conviction was pronounced."

17. A court may pronounce the offender sentenced to life imprisonment eligible for early release after the first twenty-five years provided that he has fully abided by the prison regulations throughout the previous three years (Article 79 § 5).

B. Case-law of the Constitutional Court

18. The Constitutional Court has consistently declared inadmissible complaints about the alleged incompatibility of Article 57 § 2 of the Criminal Code with the constitutional protection against discrimination. The most recent reiteration of its settled position can be found in its judgment of 25 February 2016 and reads as follows:

> "A ban on imposing life sentences or capital punishment on certain categories of offenders cannot be seen as a breach of the principle of equality before the law and the courts (Article 19 of the Constitution) or a breach of Russia's international legal commitments. It is justified by the need to take into account the age and social and physiological characteristics of such individuals on the basis of the principles of justice and humanity in the criminal law with a view to attaining, in a more comprehensive and efficient way, the objectives of criminal punishment in a democratic State based on the rule of law. According to the case-law of the Constitutional Court, the ban does not prevent [courts] from meting out just punishment to other categories of offenders which corresponds to the gravity of the crime committed, the circumstances of its commission and the personality of the offender; it does not undermine their rights and, accordingly, is not discriminatory

against them (decisions no. 638-O-O of 21 October 2008, no. 898-O-O of 23 June 2009, no. 1382-O-O of 19 October 2010, no. 1925-O of 18 October 2012, and no. 1428-O of 24 September 2013)."

III. COMPARATIVE LAW

19. According to the information available to the Court, there are currently nine member States of the Council of Europe where life imprisonment does not exist: Andorra, Bosnia-Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. In the rest of the world, many Central and South American countries (Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, El Salvador, Uruguay and Venezuela) have abolished life imprisonment, with some exceptions during wartime.

20. A comparative survey of the sentencing guidelines in thirty-seven member States of the Council of Europe in which offenders may be sentenced to life imprisonment reveals that all of them establish a special sentencing regime for juveniles or young adults, whether by way of including special provisions in the Criminal Code or enacting specific legislation dealing with juvenile delinquents. Life imprisonment of offenders below the age of 18 years is prohibited in thirty-two member States; Austria, Liechtenstein, the former Yugoslav Republic of Macedonia and Sweden extend the prohibition to young adults up to the age of 21, and Hungary includes those who had not yet turned 20 at the time the offence was committed.

21. As regards older offenders, four member States, not including Russia, establish a specific sentencing regime: an offender who has reached retirement age (Azerbaijan), the age of 60 (Georgia) or 65 (Romania and Ukraine) cannot be sentenced to life imprisonment. In Romanian law, the maximum sentence in such a case may not exceed thirty years' imprisonment.

22. As regards gender-related distinctions, the criminal law of Albania, Azerbaijan and Moldova – in addition to Russia – imposes a blanket ban on life imprisonment for women. Armenian and Ukrainian criminal law prohibits courts from imposing life sentences on women who were pregnant at the time of the offence or at the time of sentencing, and a similar provision can be found in the Bulgarian Criminal Code, which exempts pregnant female offenders from life imprisonment without parole.

IV. RELEVANT INTERNATIONAL INSTRUMENTS

A. Juvenile offenders

23. Article 6 § 5 of the International Covenant on Civil and Political Rights provides:

> "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

24. Article 37 (a) of the Convention on the Rights of the Child provides:

> "States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age ..."

25. The Committee on the Rights of the Child, in General comment No. 10 (2007), recommended:

> "Given the likelihood that a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18."

26. The United Nations General Assembly adopted Resolution A/RES/67/166 on Human Rights in the Administration of Justice on 20 December 2012, urging States –

> "... to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release ... is imposed for offences committed by persons under 18 years of age, and ... to consider repealing all other forms of life imprisonment for offences committed by persons under 18 years of age."

B. Protection of women and motherhood

27. For the text of Article 6 § 5 of the International Covenant on Civil and Political Rights, see paragraph 23 above.

28. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) reads in the relevant parts:

Article 4

> "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

29. The UN Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders (the Bangkok Rules):

Preamble

"Considering that women prisoners belong to one of the vulnerable groups that have specific needs and requirements ..."

Rule 5

"The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs ... in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating."

Rule 10

"1. Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners."

Rule 31

"Clear policies and regulations on the conduct of prison staff aimed at providing maximum protection for women prisoners from any gender-based physical or verbal violence, abuse and sexual harassment shall be developed and implemented."

Rule 48

"1. Pregnant or breastfeeding women prisoners shall receive advice on their health and diet ..."

30. On 11 January 2006 the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2006)2 to member States on the European Prison Rules, which replaced Recommendation No. R (87) 3 on the European Prison Rules accounting for the developments which had occurred in penal policy, sentencing practice and the overall management of prisons in Europe. The amended European Prison Rules read in particular as follows:

"13. These rules shall be applied impartially, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

...

34.3. Prisoners shall be allowed to give birth outside prison, but where a child is born in prison the authorities shall provide all necessary support and facilities."

31. The European Parliament's Resolution of 13 March 2008 on the particular situation of women in prison recommends:

"14. (...) that the imprisonment of pregnant women and mothers with young children should only be considered as a last resort and that, in this extreme case, they

should be entitled to a more spacious cell, and an individual cell if possible, and should be given particular attention, especially in terms of diet and hygiene; considers, furthermore, that pregnant women should receive antenatal and postnatal care and parenting classes of a standard equivalent to those provided outside the prison environment."

THE LAW

ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 5

32. The applicants complained that the fact that they had been sentenced to life imprisonment exposed them to discriminatory treatment on account of their sex and age, in breach of Article 14 of the Convention, taken together with Article 5. The relevant parts of these provisions read:

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court ..."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Submissions by the parties

1. The applicants

33. The applicants submitted that the different and less favourable treatment under Article 57 of the Criminal Code of the group to which they belonged – men aged 18 to 65, as opposed to all women and to men aged under 18 or over 65 – with respect to life sentences constituted unjustified difference in treatment on the basis of gender and age. The applicants pointed out that they were not seeking universal application of life sentences to all offenders, including women, and men aged under 18 or over 65. Rather, they claimed that, having decided that imprisonment for life was unjust and inhuman with respect to those groups, the Russian authorities should likewise refrain from subjecting men aged 18 to 65 to life imprisonment.

34. As regards the gender-related difference in treatment, the applicants considered that the difference in the sentencing of male and female offenders had no reasonable or objective justification. It was the product of an outdated and traditionalist view of the social role of women and was not founded on any scientific evidence, statistical data or generally accepted legal principles. Women's allegedly special role in society, which related, above all, to their reproductive function and childrearing, did not amount to a sufficient ground for treating female offenders more favourably than male ones. Irrespective of the biological differences between men and women, both sexes participated in caring for, protecting and supporting their children. National laws did not differentiate between the rights and obligations of a mother and a father in a child's upbringing. The Court had found that gender stereotypes, such as the perception of women as primary child-carers could not, in themselves, be considered to amount to sufficient justification for a difference in treatment (here the applicants referred to *Konstantin Markin v. Russia* [GC], no. 30078/06, § 143, ECHR 2012 (extracts)). In any event, the difference in sentencing would not achieve the purported objective of the protection of motherhood because a difference between a thirty-year prison sentence and a life sentence could not be decisive for a woman's reproductive ability if, in either case, she was bound to spend the childbearing years of her life in prison.

35. The applicants saw little merit in the Government's assertion that women were more psychologically vulnerable than men and were affected to a greater degree by the hardships of detention. In the absence of any scientific basis for that generalisation, this was yet another stereotype: that of "male toughness". The applicants did not dispute the fact that imprisonment was an ordeal, but it was an ordeal for both men and women, and both sexes included individuals of varying degrees of vulnerability.

36. The applicants acknowledged that the physiological characteristics of certain categories of women – and at specific times, for example during pregnancy, breastfeeding or childrearing – could constitute a reasonable and objective justification for a difference of treatment. However, Article 57 of the Criminal Code assumed that there were universal physiological characteristics that differentiated male and female offenders for all purposes and at all times. The excessive breadth of the Government's differentiation became striking in comparison with generally recognised norms in which only specific factors relating to women were taken into consideration. Thus, Article 6 § 5 of the International Covenant on Civil and Political Rights (ICCPR) prohibited capital punishment of pregnant women because of considerations relating to their unborn child. In the same way, Article 76 § 3 of the First Protocol Additional to the 1949 Geneva Conventions (Relating to the Protection of Victims of International Armed Conflict) sought to prohibit the pronouncement and execution of the death penalty on women who were pregnant or had dependent infants.

37. The applicants asserted that Article 57 of the Criminal Code, which laid down a permanent and immutable distinction between offenders on the basis of their sex, even if every other aspect of their circumstances was identical, did not pursue any legitimate aim. By making this distinction as a matter of law, rather than, for example, allowing the judge to take account of gender as an element in exercising sentencing discretion, a relationship of proportionality between the means employed and the aim sought to be realised was lacking. To the extent that particular circumstances relating to gender could legitimately be taken into account, there was no need for institutionalised gender-based distinctions, since the courts could consider personal circumstances, including family status and child-support needs and obligations, in the framework of the general principles of sentencing policy under Russian law when deciding on the appropriate punishment for both men and women.

38. As regards age-related differences in sentencing, the applicants acknowledged the existence of international human rights standards which prohibited imposing the most severe criminal sanctions on young offenders (they referred in particular to Article 6 § 5 of the ICCPR and Article 37(a) of the Convention on the Rights of the Child). Of those, Article 37(a) was the only provision directly applicable to the case in so far as it prohibited sentencing juvenile offenders to life imprisonment without a right to release on parole; however, it was still not relevant in the Russian context where any category of convicted prisoners sentenced to life imprisonment, regardless of their age, could be released on parole after twenty-five years.

39. Age-related differences in sentencing could be necessary if persons aged 65 or over were to be treated as a vulnerable social group who had an underdeveloped or weakened capacity to control their conduct or foresee the consequences of their actions. Yet there were no scientific studies demonstrating diminished responsibility in all persons aged over 65. If all persons over 65 were to be considered irresponsible, the fact that such individuals were eligible under Russian law to hold important public offices, including that of judges of the Constitutional Court up to the age of 75, undermined the validity of the age-related generalisation. Furthermore, taking into account that the average life expectancy was 65 years for Russian men and that those statistics did not reflect the poor conditions of detention in Russian prison facilities which must further reduce life expectancy for inmates, the effect of a life sentence on a forty-year-old offender was hardly any different from that on a sixty-five-year-old: both had illusory chances of early release on parole. Thus, the age-limit established at 65 years was arbitrary, especially taking into account that the retirement age was set at 55 years for women and 60 years for men.

40. On the issue of age differences, the applicants agreed, lastly, that juvenile offenders belonged to a socially and psychologically vulnerable group and were in need of special protective measures dictated by humane

considerations. This did not mean, however, that other age groups should be discriminated against and deprived of such protection. For older offenders, the age could in certain cases be seen as a mitigating circumstance – as allowed by Article 61 § 2 of the Criminal Code – and persons who developed serious illnesses after committing an offence could be exempted from punishment (Article 81 § 2 of the Criminal Code).

41. In conclusion, the applicants pointed out that there was an emerging international trend towards the abolition of life imprisonment, observing that some twenty-five countries worldwide did not have recourse to life imprisonment for any category of offenders. In their view, even assuming that a life sentence could be the appropriate form of punishment in certain circumstances, it should not be imposed according to gender, age or age-group characteristics but solely in relation to the particular circumstances of the offence and the personality of the offender. The applicants submitted that a high degree of individualisation of punishment should be part of contemporary sentencing policy and that individualisation should be used as a general principle instead of institutionalised gender- and age-related discrimination.

2. The Government

42. The Government claimed that the applicants were not victims of any violation of the Convention since their convictions had been "lawful" within the meaning of Article 5 § 1 (a). In their view, what the applicants sought was a change in the Russian criminal law which would allow others, including women, young offenders and offenders aged 65 or over, to be given harsher sentences, while the applicants' personal situation would remain the same. The Government pointed out that a finding of a violation of Article 14 would not constitute a ground for reviewing individual sentences or for completely abolishing life imprisonment in Russia.

43. The Government submitted that a review of the Court's case-law considering the issue of life imprisonment from the standpoint of Article 3 of the Convention demonstrated the compatibility of Russian law – which provided for the right to release on parole also in cases where life imprisonment had been imposed – with the Convention. Life imprisonment could be imposed in a majority of States worldwide and, according to the Government, only six member States of the Council of Europe had abolished it. In Russia life imprisonment was a penalty for the most serious crimes but was always accompanied by alternative penalties and never applied automatically. The Government emphasised that the Contracting States should be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes (they referred to *László Magyar v. Hungary*, no. 73593/10, § 46, 20 May 2014).

44. Referring to the consistent case-law of the Russian Constitutional Court, the Government submitted that, inasmuch as Article 57 of the

Criminal Code provided that female offenders and offenders below the age of 18 or over the age of 65 could not be sentenced to life imprisonment, it was based on the principles of justice and humanity which required that the sentencing policy take into account the age and "physiological characteristics" of various categories of offenders. The restrictions concerning those categories of offenders did not affect the sentencing of other offenders, in respect of whom the sentences reflected the nature of the crime and the danger posed to the public by it, the circumstances in which it was committed, and the personality of the offender. In the Government's view, the case-law of the Constitutional Court reflected the requirements of international law concerning a differentiated approach to punishment according to the offender's sex and age. They referred, as regards juvenile offenders, to Article 37 of the Convention on the Rights of the Child, the position of the Committee on the Rights of the Child and that of the Human Rights Council, the UN General Assembly's Resolution of 9 November 2012[1] and other international instruments, as well as to the fact that a vast majority of member States had abolished life imprisonment for children. As to offenders aged 65 or over, the Government pointed out that life imprisonment of 65-year-olds would make them eligible for release on parole only at the age of 90, which was an illusory possibility having regard to life expectancy.

45. The Government further pointed out that international law provided for a more humane approach towards women, while the UN Convention on the Elimination of All Forms of Discrimination against Women stated that special measures aimed at protecting maternity were not to be considered discriminatory (CEDAW) (Article 4 § 2). They referred to certain scientific studies according to which women constituted a minority of detainees worldwide. Women were often the primary carers of children before incarceration and up to 90 percent of them had a history of domestic abuse which contributed to their criminal conduct and emphasised their vulnerability. According to the Government, Russia was not the only State that did not sentence women to life imprisonment; other States included Albania, Armenia, Azerbaijan, Belarus and Uzbekistan. The Ukrainian Parliament had adopted, at first reading, a draft law exempting women from life sentences.

46. Russian law established as a general rule that a life sentence could be imposed for particularly serious crimes against life and public safety. The prohibition on sentencing female and juvenile offenders and offenders aged 65 or over to life imprisonment was an exception to the rule. This exception did not infringe the rights of the majority of convicted prisoners, but rather

1. The document referred to by the Government was a draft resolution submitted to the Third Committee of the UN General Assembly. It was subsequently amended (see UN doc. A/C.3/67/L. 34 Rev. 1) and finally adopted by the Plenary of the General Assembly in the form reproduced in paragraph 26 above.

established a privileged approach to sentencing for specific groups of individuals. It could be described as "positive inequality" designed to make up, by legal means, for the naturally vulnerable position of those social groups. In the Government's submission, the concept of discrimination referred only to unjustified restrictions. In that sense, there was no discrimination in the applicants' case, and their grievances were of an abstract nature because their sentences had been determined in accordance with the gravity of the crimes they had committed and did not put them at any disadvantage *vis-à-vis* women, juveniles or persons aged 65 or over.

47. On the issue of whether a difference in treatment was reasonably proportionate to the legitimate aim pursued, the Government submitted that age-related restrictions were necessary because juveniles and persons aged 65 or over were vulnerable social groups who had an underdeveloped or weakened capacity to understand the implications of their conduct, to control it or to foresee the consequences of their actions. They were prone to impulsive, unconsidered behaviour that could result in criminally reprehensible conduct. As to women, the sentencing exception was justified in view of their special role in society which related, above all, to their reproductive function. The Russian Constitutional Court had previously held that a different retirement age for men and women was justified not only by physiological differences between the sexes but also by the special role of motherhood in society, and did not amount to discrimination but rather served to reinforce effective, rather than formal, equality.

48. In sum, the Government believed that, given the biological, psychological, sociological and other particular features of female offenders, young offenders and offenders aged 65 or over, sentencing them to life imprisonment and their incarceration in harsh conditions would undermine the penological objective of their rehabilitation. Besides, the exception concerned in reality a small number of convicted persons. In Russia, as of 1 November 2011, only 1,802 offenders had been sentenced to life imprisonment. Of the total number of 533,024 prisoners, only 42,511 were female.

3. The third party

49. The third party, Equal Rights Trust, submitted that, with the exception of provisions relating to juvenile offenders, blanket rules which exempted particular groups from life imprisonment could not be justified under Article 14. In support of its submission, the third party referred to international human rights law and regional and domestic law and practice.

50. The third party indicated that references to "positive discrimination" in the context of this case were misplaced and not in accordance with the meaning of this notion in international law. Positive action was a necessary element of the right to equality and it included a range of measures to overcome past disadvantage. The measures taken must be designed to

address the disadvantage identified and the State must be able to show on what basis they had concluded that the measures chosen would attain that objective. However, a blanket exemption of women from a certain type of sentence was not temporary and did not pursue any objective linked to the equality of opportunity or treatment. Article 4(2) of the CEDAW was a narrow provision relating to treatment of pregnant women and new mothers and could not be used to justify a difference in treatment of women on the basis of biological difference outside that context or to justify differences in treatment based on a perceived social role of women as mothers. Special measures for pregnant women and new mothers must be limited to what was strictly necessary (reference was made to *Johnston v. Chief Constable of the Royal Ulster Constabulary*, ECJ, Case C-222/84, 15 May 1986, §§ 44-46). Courts had consistently rejected arguments based on paternalism and perceptions that women were more "vulnerable" than men and in need of "protection" (they referred to *Karlheinz Schmidt v. Germany*, no. 13580/88, 18 July 1994, § 28, Series A no. 291-B, concerning the exemption of women from service compulsory for men on the basis of women's "physical and mental characteristics", and *Emel Boyraz v. Turkey*, no. 61960/08, § 52, 2 December 2014, concerning the restriction of recruitment of security officers to men due to risks and night-time work).

51. As regards offenders aged 65 or over, the third party submitted that age discrimination was prohibited under all key international treaties. Creating distinctions between people above and below a particular age was inherently problematic, requiring a high degree of evidence and justification. Generalisation as to a measure's ability to achieve a legitimate objective was insufficient (*Age Concern England*, ECJ, Case C-388/07, 5 March 2009, § 51). Even if it was shown that a life sentence would more often be considered unduly harsh in the cases of persons aged over 65 than persons under 65, a blanket exemption was not necessarily a proportionate means of achieving the aim of avoiding harsh sentences. Age was not binary and any distinctions on the basis of age, where a cut-off point was identified, could call for a comparative analysis of State practice and scientific evidence when considering whether a measure was justified.

52. Regarding ways of remedying the existing situation, the third party submitted that if a State, acting at its discretion, decided that a life sentence was "inhumane" if imposed on certain groups, and this was found to be in violation of Article 14, the principle of "no levelling down" would mean that a State could not remedy that discrimination by simply removing the more favourable treatment from the protected groups. In accordance with international legal principles and customary international law, the implementation of decisions of international tribunals should not abolish, restrict, or limit existing rights (reference was made to Article 53 of the Convention). Once the State had reduced the limitations on the right to liberty of a group of persons, it could not justify the reversal of this progress

by reference to its obligation under the Convention. Instead, the third party submitted that, in order to comply with Article 14, the State should adopt an individualised approach to sentencing, which took into account, among other things, the offender's particular characteristics. An individualised approach would allow for a more nuanced calibrating of sentencing to the specific vulnerabilities of narrowly defined categories of individuals, as opposed to the overly broad and therefore arbitrary distinctions on the basis of gender or age.

B. The Court's assessment

1. Applicability of Article 14 in conjunction with Article 5

(a) Whether the facts of the case fall "within the ambit" of Article 5

53. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. However, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, and to this extent it is autonomous. A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe the Article when read in conjunction with Article 14, for the reason that it is of a discriminatory nature. Accordingly, for Article 14 to become applicable, it suffices that the facts of the case fall "within the ambit" of another substantive provision of the Convention or its Protocols (see *Clift v. the United Kingdom*, no. 7205/07, § 41, 13 July 2010; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 159, ECHR 2008; and *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 33-34, § 9, Series A no. 6).

54. The Court observes that the applicants did not complain about the severity of punishment as such or the length of their sentence or allege a violation of their substantive right to liberty. They complained that their sentences had deprived them of their liberty for life and that, under Article 57 of the Criminal Code, they had been treated less favourably than women or than other men aged under 18 and over 65 convicted of similar or comparable crimes, because of their gender and age, in violation of Article 14 taken in conjunction with Article 5 of the Convention.

55. Both applicants were deprived of their liberty after conviction by a competent court, an eventuality that is explicitly covered by Article 5 § 1 (a) of the Convention. The Court reiterates that matters of appropriate sentencing fall in principle outside the scope of the Convention, it not being its role to decide, for example, what is the appropriate term of detention applicable to a particular offence (see *Vinter and Others v. the United*

Kingdom [GC], nos. 66069/09, 130/10 and 3896/10, § 105, ECHR 2013 (extracts); *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, ECHR 2001-VI; *T. v. the United Kingdom* [GC], no. 24724/94, § 117, 16 December 1999; and *V. v. the United Kingdom* [GC], no. 24888/94, § 118, ECHR 1999-IX, and, by contrast, as regards a manifestly disproportionate punishment for ill-treatment, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 61, 20 December 2007; *Okkalı v. Turkey*, no. 52067/99, § 73, ECHR 2006-XII (extracts); *Derman v. Turkey*, no. 21789/02, § 28, 31 May 2011).

56. At the same time the Court has expressed the view that measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application, among other things (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 127, ECHR 2013, and *Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 55-83, ECHR 2002-IV). Similarly, again in the context of the execution of a criminal sentence, in a case concerning eligibility of a life prisoner for parole, the Court considered that "although Article 5 § 1 (a) of the Convention does not guarantee a right to automatic parole, an issue may arise under that provision taken together with Article 14 of the Convention if a settled sentencing policy affects individuals in a discriminatory manner" (see *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999; see also, to the same effect, *Clift*, cited above, § 42).

57. It is also noteworthy that, in contrast to the cases mentioned above but similarly to the one under review, in certain instances it is the criminal sentencing measure itself – rather than its execution – decided pursuant to domestic legal provisions differentiating between offenders according to age and gender which has been found to give rise to an issue under Article 14 of the Convention taken together with Article 5 (see *Nelson v. the United Kingdom*, no. 11077/84, Commission decision of 13 October 1986, which concerned allegations of discrimination based on age, and *A.P. v. the United Kingdom*, no. 15397/89, Commission decision of 8 January 1992 (striking-out), which concerned differences in sentencing of male and female young offenders).

58. Article 5 of the Convention does not preclude the imposition of life imprisonment (see *Vinter and Others*, cited above, §§ 104 to 106), where such punishment is prescribed by national law. However, the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see *E.B. v. France* [GC], no. 43546/02, § 48, 22 January 2008; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01

and 65900/01, § 40, ECHR 2005-X; and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94).

59. It follows that where national legislation exempts certain categories of convicted prisoners from life imprisonment, this falls within the ambit of Article 5 § 1 for the purposes of the applicability of Article 14 taken in conjunction with that provision.

60. Accordingly, in so far as the applicants complained about the allegedly discriminatory effect produced by the sentencing provisions in Article 57 of the Criminal Code, the Court finds that the facts of the case fell "within the ambit" of Article 5 of the Convention.

(b) Whether the alleged difference in treatment related to any of the grounds in Article 14

61. Article 14 does not prohibit all differences in treatment, but only those differences based on an identifiable, objective or personal characteristic, or "status", by which individuals or groups are distinguishable from one another. It lists specific grounds which constitute "status" including, *inter alia*, sex, race and property. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment") and the inclusion in the list of the phrase "any other status" (in French "toute autre situation"). The words "other status" have generally been given a wide meaning, and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Clift*, cited above, §§ 56-58; *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010; and *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23).

62. The applicants contended that Article 57 of the Russian Criminal Code established a sentencing policy which differentiated on the basis of sex and age with regard to life imprisonment. The Court notes that "sex" is explicitly mentioned in Article 14 as a prohibited ground of discrimination and that it has previously accepted that "age" is also a concept covered by this provision (see *Schwizgebel v. Switzerland*, no. 25762/07, § 85, ECHR 2010 (extracts), and *Nelson*, cited above).

(c) Conclusion

63. In the light of the above considerations, the Court finds that Article 14 of the Convention taken in conjunction with Article 5 is applicable in the present case.

2. Compliance with Article 14 of the Convention taken in conjunction with Article 5

(a) The general principles

64. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali,* cited above, § 82; *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013 (extracts); and *Biao v. Denmark* [GC], no. 38590/10, § 90, ECHR 2016).

65. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see *Biao*, cited above, § 92, and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 177, ECHR 2007-IV).

(b) Whether the applicants were in an analogous or relevantly similar position to other offenders

66. The Court must first determine whether or not there was in the instant case a difference of treatment of persons in analogous or relevantly similar situations.

67. The applicants' complaint relates to the sentencing of offenders who have been found guilty of particularly serious crimes punishable with imprisonment for life. The applicants were given life sentences, whereas a female or juvenile offender or an offender aged 65 or over convicted of the same or comparable offences would not have been given a sentence of life imprisonment because of the explicit statutory prohibition in Article 57 § 2 of the Criminal Code (see paragraph 16 above).

68. It follows that the applicants were in an analogous situation to all other offenders who had been convicted of the same or comparable offences. By contrast, the *Gerger* case was an example of a different kind of situation: in so far as convicted terrorists were not entitled to parole until they had served three quarters of their sentence, unlike prisoners sentenced for ordinary criminal offences, the Court held that "the distinction [was] made not between different groups of people, but between different types of

offence, according to the legislature's view of their gravity" (see *Gerger*, cited above, § 69, see also, in the same vein, *Kafkaris*, cited above, § 165, in which the Court did not accept that a prisoner serving a life sentence was in an analogous or relevantly similar position to other prisoners who were not serving life sentences).

(c) Whether the difference in treatment was justified

69. The present case concerns a sentencing policy which exempted female offenders, juvenile offenders and offenders aged 65 or over from life imprisonment. It cannot be disputed that this exemption amounted to a difference in treatment on grounds of sex and age. It falls next to the Court to examine whether this difference of treatment pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In doing so it must also have regard to the margin of appreciation the respondent State enjoys in this context.

70. The Government maintained that the difference of treatment was intended to promote the principles of justice and humanity which required that the sentencing policy take into account the age and "physiological characteristics" of various categories of offenders (see paragraph 44 above). The Court takes the view that this aim may be regarded as legitimate in the context of sentencing policy and for the purposes of applying Article 14 in conjunction with Article 5 § 1.

71. As regards the proportionality of the means employed, it must first be recalled that the present case concerns one specific type of penalty: life imprisonment. By contrast with various non-custodial or fixed-term prison sentences, life imprisonment is reserved in the Russian Criminal Code for the few particularly serious offences in respect of which, after taking into account all the aggravating and mitigating circumstances, the trial court is satisfied that a life sentence is the only punishment that would befit the crime. Life imprisonment is not a mandatory or automatic sentence for any offence, no matter how serious it might be.

72. The imposition of life sentences for especially serious crimes on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Murray v. the Netherlands* [GC], no. 10511/10, § 99, ECHR 2016; *Vinter and Others*, cited above, § 102; and *Kafkaris*, cited above, § 97). This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case (see *Vinter and Others*, cited above, § 106).

73. The Court has on numerous occasions indicated that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (see *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26; *Kress*

v. France [GC], no. 39594/98, § 70, ECHR 2001-VI; and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 53, ECHR 2012). The Court has also pointed out that any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic state (see *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 118, ECHR 2014 (extracts)). As a consequence, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953. Progress towards the complete *de facto* and *de jure* abolition of the death penalty within the member States of the Council of Europe is an illustration of this ongoing evolution. The territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment and the Court has accepted that exposing an applicant to a real risk of being sentenced to death and executed elsewhere may give rise to an issue under Article 3 of the Convention (see *Soering v. the United Kingdom*, 7 July 1989, §§ 102-104, Series A no. 161; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 115-18 and 140-43, ECHR 2010; and *A.L. (X.W.) v. Russia*, no. 44095/14, §§ 63-66, 29 October 2015).

74. The situation with regard to life imprisonment is different. As matters currently stand, life imprisonment as a form of punishment for particularly serious offences remains compatible with the Convention. The idea that the imposition of a life sentence on an adult offender may raise an issue under Article 3 on account of its irreducible character is relatively recent (see *Kafkaris*, cited above, § 97). In *Vinter and Others* (cited above), the Court drew the following conclusion:

> "119. ... [T]he 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.
>
> 120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing ..., it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter ... .
>
> 121. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.
>
> 122. ... A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a

> review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

75. As can be seen from the above, the Contracting States are in principle free to decide whether a life sentence constitutes appropriate punishment for particularly serious crimes but their discretion in this respect is not unfettered and is subject to certain minimum requirements. The Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Klass and Others v. Germany*, 6 September 1978, § 68, Series A no. 28; see also *Maaouia v. France* [GC], no. 39652/98, § 36, ECHR 2000-X, and *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). It follows that where a State, in the exercise of its discretion, takes measures aimed at complying with such minimum requirements, or furthering the aims thereof, this will weigh heavily in assessing the proportionality of the measures in question in the context of Article 14 in conjunction with Article 5.

76. The applicants were sentenced to life imprisonment following an adversarial trial during which they were able to submit arguments in their defence and to state their view on the appropriate punishment. Although they had initially alleged that the criminal proceedings against them had been marred by procedural deficiencies, the Court, after careful consideration of their complaints, rejected them as unsubstantiated (see the decisions of 27 September 2011 and 13 May 2014 in paragraph 4 above). The outcome of the applicants' trials was decided on the specific facts of their cases and their sentences were the product of individualised application of criminal law by the trial court whose discretion in the choice of appropriate sentence was not curtailed on account of the requirements prescribed in paragraph 2 of Article 57 of the Criminal Code. In these circumstances, in view of the penological objectives of the protection of society and general and individual deterrence, the life sentences imposed on the applicants do not appear arbitrary or unreasonable. Moreover, the applicants will be eligible for early release after the first twenty-five years provided that they have fully abided by the prison regulations in the previous three years (Article 79 § 5 of the Criminal Code); accordingly, no issues comparable to those in the above-cited judgments of *Vinter and Others* or, more recently, *Murray* arise in the instant case.

77. The Court reiterates that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the

observance of the Convention's requirements rests with the Court (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 126, ECHR 2012 (extracts); *Stec and Others*, cited above, §§ 63-64; and *Ünal Tekeli v. Turkey*, no. 29865/96, § 54, ECHR 2004-X (extracts)).

78. On the one hand, the Court has repeatedly held that differences based on sex require particularly serious reasons by way of justification and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation (see *Konstantin Markin*, cited above, § 127; *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013; *Vallianatos and Others*, cited above, § 77; and *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014). On the other hand, as the Court has also stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court (see *Vinter and Others*, cited above, § 105; see also *T. v. the United Kingdom*, cited above, § 117; *V. v. the United Kingdom*, cited above, § 118; and *Sawoniuk*, cited above).

79. An additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the existence or non-existence of a European consensus. Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any emerging consensus as to the standards to be achieved (see, *mutatis mutandis*, *Schwizgebel*, cited above, §§ 79-80; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 81, ECHR 2007-V; *Fretté v. France*, no. 36515/97, § 40, ECHR 2002-I; and *Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998-II; see also *Biao*, cited above, §§ 131-33).

80. Firstly, the Court sees no reason to question the difference in treatment of the group of adult offenders to which the applicants belong, who are not exempted from life imprisonment, as compared to that of *juvenile* offenders who are so exempted. Indeed, the exemption of juvenile offenders from life imprisonment is consonant with the approach that is common to the legal systems of all the Contracting States, without exception, namely the abolition of life imprisonment for offenders considered juveniles under their respective domestic laws (see paragraph 20 above). The said exemption is also consistent with the recommendation of the Committee on the Rights of the Child to abolish all forms of life imprisonment for offences committed by persons below the age of 18 and with the UN General Assembly's Resolution inviting the States to consider repealing all forms of life imprisonment for such persons (see paragraphs 25

and 26 above). Its purpose is evidently to facilitate the rehabilitation of juvenile delinquents. The Court considers that when young offenders are held accountable for their deeds, however serious, this must be done with due regard for their presumed immaturity, both mental and emotional, as well as the greater malleability of their personality and their capacity for rehabilitation and reformation.

81. Secondly, in so far as the applicants complained of being treated differently from offenders *aged 65 or over* – the other age group exempted from life imprisonment – it is to be noted that, according to the above-mentioned *Vinter* principles, a life sentence will be compatible with Article 3 only if there is a prospect of release and a possibility for review (both of which must exist from the time of imposition of the sentence). Against the background of this Convention requirement, the Court sees no grounds for considering that the relevant domestic provision excluding offenders aged 65 or over from life imprisonment had no objective and reasonable justification. As can be seen from the material before the Court, the purpose of that provision in principle coincides with the interests underlying the eligibility for early release after the first twenty-five years for adult male offenders aged under 65, such as the applicants, noted in *Vinter* as being a common approach in national jurisdictions where life imprisonment can be imposed (see paragraph 74 above). Reducibility of a life sentence carries even greater weight for elderly offenders in order not to become a mere illusory possibility. By limiting the imposition of life sentences through providing for a maximum age limit, the Russian legislature used one among several methods at its disposal for securing a prospect of release for a reasonable number of prisoners and thus acted within its margin of appreciation in line with Convention standards.

82. Thirdly, in so far as the applicants felt aggrieved by being treated differently from adult *female* offenders of the same age group as theirs (18 to 65) and who were exempted from life imprisonment on account of their gender, the Court has taken note of various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood (see paragraphs 27 to 30 above). The Government provided statistical data showing a considerable difference between the total number of male and female prison inmates (see paragraph 48 above). They also pointed to the relatively small number of persons sentenced to life imprisonment (ibid.). It is not for the Court to reassess the evaluation made by the domestic authorities of the data in their possession or of the penological rationale which such data purports to demonstrate. In the particular circumstances of the case, the available data, as well as the above elements, provide a sufficient basis for the Court to conclude that there exists a public interest

underlying the exemption of female offenders from life imprisonment by way of a general rule.

83. It is further observed that, beyond the consensus not to impose life imprisonment on juvenile offenders and to provide for a subsequent review in those jurisdictions which do so for adult offenders (see *Vinter and Others*, cited above, § 120), there is little common ground between the domestic legal systems of the Contracting States in this area. Whilst life imprisonment does not exist in nine Contracting States, either because no such sentences are available or because they have been abolished at some point in time (see paragraph 19 above), a majority of the Contracting States have opted for retaining the possibility of sentencing offenders for life in cases of particularly serious crimes. Within the latter group, there is no uniformity as to the age up to which the exemption from life imprisonment applies; many States have fixed the age at 18 years, in others it varies between 18 and 21 years (see paragraph 20 above).

84. The disparity in approach to other groups of offenders which Contracting States have chosen to exempt from life imprisonment is even more salient. Some Contracting States have established a specific sentencing regime for offenders who have reached the age of between 60 and 65 (see paragraph 21 above). Other Contracting States have decided to exempt female offenders who were pregnant at the time of the offence or at the time of sentencing from life sentences. Yet another group of States, including Russia, have extended this approach to all female offenders (see paragraph 22 above).

85. The Court considers it quite natural that the national authorities, whose duty it is also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy broad discretion when they are asked to make rulings on sensitive matters such as penal policy. Moreover, the area in question should still be regarded as one of evolving rights, with no established consensus, in which States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (compare *Schalk and Kopf v. Austria*, no. 30141/04, § 105, ECHR 2010). Since the delicate issues raised in the present case touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.

86. It therefore appears difficult to criticise the Russian legislature for having established, in a way which reflects the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an exemption represents, all things considered, social progress in penological matters (compare *Petrovic*, cited above, § 41). The situation obtaining in the instant case is different from that in those cases where the Court was able to note a widespread and consistently developing consensus and associated legal changes to the domestic laws of Contracting

States concerning a specific issue (compare *Konstantin Markin*, cited above, § 140; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 104, ECHR 1999-VI; and *Vallianatos and Others*, cited above, § 91). The Court is unable to discern an international trend in favour of abolishing life imprisonment or, on the contrary, confirming positive support for it. It notes however that life imprisonment in Europe has become limited in the sense of the requirement of reducibility of the sentence (see *Vinter and Others*, cited above, § 119) which may in future require further positive obligations on the part of the member States (see, for example, *Murray*, cited above, §§ 124-125). In the absence of common ground regarding the imposition of life imprisonment, the Russian authorities have not overstepped their margin of appreciation. Notwithstanding a more favourable position in which the perpetrators of offences comparable to those committed by the applicants have found themselves, the legislation on whose basis the punishments were served on the applicants and which is being challenged by them is not in breach of the applicable international law or markedly at variance with the solutions adopted by other member States of the Council of Europe in this sphere (compare *Schwizgebel*, cited above, § 92).

87. In sum, while it would clearly be possible for the respondent State, in pursuit of its aim of promoting the principles of justice and humanity, to extend the exemption from life imprisonment to all categories of offenders, it is not required to do so under the Convention as currently interpreted by the Court. Moreover, in view of the practical operation of life imprisonment in the Russian Federation, both as to the manner of its imposition and to a possibility of subsequent review, the interests of the society as a whole as far as they are compatible with the Convention and having regard to the wide margin of appreciation which the Court has found that the respondent Government enjoy in this context, the Court is satisfied that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. It concludes that the impugned exemptions did not constitute a prohibited difference in treatment for the purposes of Article 14 taken in conjunction with Article 5. In reaching this conclusion, the Court has taken full account of the need to interpret the Convention in a harmonious manner and in conformity with its general spirit.

88. In the light of the above considerations, the Court finds that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 5, whether in respect of the difference in treatment on account of age, or in respect of the difference in treatment on account of sex.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 5, as regards the difference in treatment on account of age;

2. *Holds*, by ten votes to seven, that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 5, as regards the difference in treatment on account of sex.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 January 2017.

Roderick Liddell	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Sajó;
(b) concurring opinion of Judge Nußberger;
(c) concurring opinion of Judge Turković;
(d) concurring opinion of Judge Mits;
(e) joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström, and Kucsko-Stadlmayer;
(f) dissenting opinion of Judge Pinto de Albuquerque.

G.R.
R.L.

CONCURRING OPINION OF JUDGE SAJÓ

1. I concur with the ruling that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 5, as regards the difference in treatment on grounds of sex or age. However, as far as the alleged sex discrimination is concerned, I have come to this conclusion on the basis of different considerations.

2. This Court, like other jurisdictions, has repeatedly held that differences based on sex require particularly serious reasons by way of justification and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation. Where the treatment of men and women differ, there is a presumption that this signals gender discrimination. This assumption is justified by a long history of unacceptable treatment of women. In addition, differences based on gender, even if they favour women, may express deep-seated bias and misogynistic stereotypes which must not be allowed to underlie government policies.

3. According to Russian law, life sentences cannot be imposed on female offenders but can be imposed on male offenders. The applicants consider this to be discriminatory and therefore in violation of the Convention.

4. One way of looking at this case is to find that it does not fall within the ambit of Article 5. It is true that the applicants are in a situation of lawful detention after conviction (Article 5 § 1 (a)). It is precisely because they are in that situation, however, that there is no Article 5 right involved. Being lawfully convicted, they do not have a right to liberty. What they are requesting is not to be subjected to a commutable life sentence. But according to *Vinter,* there is no such right under the Convention. Contrary to the finding in the present judgment, which accepts that the applicants "did not complain about the severity of punishment as such or the length of their sentence" (see paragraph 54), this is exactly what they did complain about. Be that as it may, the Court found Article 14 to be applicable; it is on the basis of this assumption that the case has to be determined.[1]

5. There is no discrimination as the applicants are not worse off because female offenders cannot be punished with a life sentence. There is nothing

1. In its reasoning in the present judgment (see paragraph 56) the Court relied on *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999, a case concerning eligibility of a life prisoner for parole, in which the Court considered that "although Article 5 § 1 (a) of the Convention does not guarantee a right to automatic parole, an issue may arise under that provision taken together with Article 14 of the Convention if a settled sentencing policy affects individuals in a discriminatory manner" (see also, to the same effect, *Clift*, cited above, § 42). The fact that an "issue *may* arise" does not mean that it did arise.

in the imposition of a commutable life sentence on an offender that would violate the Convention. He receives what the judge finds appropriate. He is not discriminated against. Women (a class of people) do not receive the same punishment. One could argue that the most serious crimes women commit differ from those committed by male offenders (for example, the high number of cases of – usually provoked – domestic violence, neonaticide).[2] Female crime is far less common than male crime; therefore there can be less need for deterrence. It is not unreasonable for the legislator to create a separate category for purposes of punishment, on the assumption that for this category of persons a lesser punishment is sufficient. Moreover, female offenders typically do not pose the same security problem that men do[3], and the danger of recidivism is less. It is true that women may commit some very heinous crimes, for example they may be partners in terrorist acts, but the question is not whether there are rare instances where they commit the same crime as male offenders but whether the State is entitled to create categories for purposes of punishment with a view to general prevention and deterrence. It is unfortunate that the Russian Government did not provide adequate data but this does not mean that some public data on basic facts cannot be taken into consideration.

6. This Court has always recognised at least a wide margin of appreciation in matters of sentencing policies and actual punishment. I do not recall a case where the Court would have found a violation of Article 14 in conjunction with Article 5 of the Convention simply because for an allegedly identical crime two people received a different sentence. The following is an extract from the case of *Kafkaris v. Cyprus (*[GC], no. 21906/04, § 161, ECHR 2008):

> "Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of **essentially different factual circumstances** and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (see, among other authorities, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001). The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Gaygusuz v. Austria*, 16 September

2. For example, a longitudinal study concerning Sweden found that the victims of female homicide were more often male, intimate partners, intoxicated at the time of the offence, and killed by sharp force injuries. Previous violence between victim and offender [an attenuating circumstance] was also more common in cases with female offenders. Karin Trägårdh, Thomas Nilsson, Sven Granath & Joakim Sturup, "A Time Trend Study of Swedish Male and Female Homicide Offenders from 1990 to 2010", 15 *International Journal of Forensic Mental Health* 2016 pp. 125-35. This is the long-term historical pattern in Europe, see Rosemary Gartner, Bill McCarthy, "The Oxford Handbook of Gender, Sex, and Crime", OUP (2014) 145.

3. Kathryn Ann Farr, "Classification for Female Inmates: Moving Forward", 46 *Crime & Delinquency* 2000, pp. 3-17.

1996, § 42, Reports 1996-IV). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background ... ”

7. Secondly, I find that the same period of imprisonment for a woman is more painful than for a man, perhaps because, typically, a woman is deprived of the possibility of giving birth to a child, and in particular raising a child. This may sound like a simple gender stereotype, although many people would argue that there are biological differences and specificities of the female brain. But in a society where women are expected to have children and are raised in a social environment in which they are conditioned to believe that their happiness comes from having children they will suffer from the lack of fulfilment of this socially imposed expectation. Whatever the reasons, the already high suicide rates prove to be even higher (compared with the general population) for women.[4]This is an indication of the additional burden that is imposed on women serving very long periods of imprisonment.

8. These remarks are intended to show that there are additional reasons for finding that male and female prisoners are not in an analogous situation.

9. But neither the wide margin of appreciation applicable in matters of punishment and sentencing categories nor the fact that the two genders are not in an analogous situation as to punishment are the fundamental reason why I cannot see these differences as discriminatory. The fundamental reason is that male prisoners are not worse off. It is not appropriate to claim discrimination when (notwithstanding all legal extensions) the disadvantage has nothing to do with the difference. The disadvantage is a well-deserved punishment and not exclusion from a benefit (as in the case of *Konstantin Markin v. Russia* ([GC], no. 30078/06, ECHR 2012 (extracts)). Contrary to a service or benefit, where the exclusion can be discriminatory on impermissible grounds, here the applicants were not excluded from a benefit. Nor were the applicants punished more severely than they deserved because of their sex; there is no disadvantage. The comparator is not what others receive as a punishment but whether the applicants received more than they deserved. An amnesty or pardon cannot be successfully challenged on the ground that others have not benefited from it (although it may violate the State’s duty to protect life, as in cases of impunity (see *Kafkaris*, cited above, § 154).

10. While in most cases the standard logic of contemporary discrimination analysis yields satisfactory results, it cannot be applied mechanically to all cases. This is one of the exceptions, where we should go back to the roots of what discrimination means: to be worse off, or to be prevented from being better off, on impermissible grounds. But the applicants were not worse off, nor denied the possibility of being better off;

4. Opitz-Welke, Annette et al., “Prison suicide in female detainees in Germany 2000–2013”, 44 *Journal of Forensic and Legal Medicine*, 2016, pp. 68-71.

they just got what they deserved: a punishment. Seen from this perspective, the application borders on abuse of petition.

CONCURRING OPINION OF JUDGE NUSSBERGER

1. Sometimes "better is the enemy of good" – this is a famous saying of Voltaire. In the case of *Khamtokhu and Aksenchik v. Russia* the better solution would be to find a violation of Article 5 taken in conjunction with Article 14 of the Convention as argued by the minority. This could easily be justified in the light of the Court's case-law, which is based on the idea that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention" (see *Van Raalte v. the Netherlands*, 21 February 1997, § 39, *in fine*, *Reports of Judgments and Decisions* 1997-I *Petrovic v. Austria*, 27 March 1998, § 37, *Reports* 1998-II; and *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI). Our colleagues, Judges Sicilianos, Møse, Lubarda, Moruou-Vikström and Kucsko-Stadlmayer convincingly argue in their dissenting opinion that such "very weighty reasons" do not exist for reserving the possibility of life sentences for men only.

2. But even if the finding of a violation were the "better solution", it would not be a "good solution".

3. A violation of the prohibition of discrimination enshrined in Article 14, if isolated and not linked to the violation of another Convention provision, is different from all other violations of the Convention. It gives the State Parties two options in order to rectify it: they can either take away the privilege of one group or grant the privilege to the other group as well.

4. Requiring Russia to abolish life sentences for all may be possible if there is a European consensus in this regard (see, among many other authorities, *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008, and *Bayatyan v. Armenia* [GC], no. 23459/03, §§ 102-03, ECHR 2011). However, as the research report shows, there are currently only nine member States of the Council of Europe where life imprisonment does not exist (see paragraph 19). So there is neither a consensus to consider life imprisonment as a necessary option in the sentencing policy, nor to abolish it. For the latter approach there is even less support than for the former one. In such a situation Article 53 of the Convention cannot be interpreted as reducing to zero the existing broad margin of appreciation in defining the sentencing policy, and that only for States offering a more protective solution for some and not for all (on this point see also the concurring opinion of Judge Turkovic). Such an approach would be a disincentive for any reform.

5. I agree with the minority that the arguments advanced in the judgment in justification of preferential treatment of women are not really convincing. In my view, the Court should instead have exclusively followed the line of argumentation in the *Petrovic* case (cited above), which has many common features with the present case. First, it was not disputed that there was a

difference in treatment on grounds of sex. Second, it was clear that there was no common standard in the policy of the member States of the Council of Europe. Third, the disputed measure (abolition of life sentences in the present case; provision of parental leave allowances in the *Petrovic* case) could be regarded as a recent and welcome development. It is true that when the Court decided the *Petrovic* case, the legislation had already been changed and Austria had provided both men and women with parental allowance and thus moved towards the desired aim. Nevertheless, it seems to me that in the present case the same conclusion can be drawn as in *Petrovic*: It appears difficult to criticise the respondent State for having introduced, in a gradual manner and thus not for all at once, a measure advancing human rights protection, or even a measure based on the principles of "justice and humanity" as argued by the Russian Government (see paragraph 70).

6. It is true that in the present case it might only be a hope that the step taken by Russia reflects the evolution of society in that sphere and that the ideals of justice and humanity will also be applied to the sentencing policy in respect of men in the near future. But a State should not be punished for taking one step in a good direction merely because the second step does not follow.

7. The intervening third party as well as the dissenting judges have clearly seen the dilemma of the case and tried to address it by reference to an "individualised approach to sentencing" (see paragraph 52 of the judgment) or "adjustment of the sentence in question and the means of its enforcement" (see paragraph 20 of the joint dissenting opinion). But none of these solutions is to the point. The question is not about sentencing in individual cases, but a much more general one regarding the extent to which life sentences may be kept on the statute books as an *ultima ratio* threat in cases of outrageous crimes. In Russia this is considered necessary only for men. I have voted for a non-violation as I cannot accept that such an *ultima ratio* threat will also be introduced for women. It would be appalling if such a backward step were justified by the necessity to execute a judgment of the Court and were even done under the supervision of the Committee of Ministers. This risk is too great and too real for me. Unfortunately, I do not see any intermediary solution which would make it possible to adopt an avant-garde approach to equality between the sexes within the framework of the Convention in this complicated case.

CONCURRING OPINION OF JUDGE TURKOVIĆ

1. The question put before the Court in this case was an unusual and complex one. Could life sentences, which are not currently perceived as being in themselves contrary to human dignity but which relatively recently have become limited in the sense of the requirement of reducibility and may in future require further positive obligations on the part of the member States (see paragraph 86 of the judgment), be gradually abolished for certain groups without thereby violating Article 14 of the Convention? The Grand Chamber was almost unanimous in respect of juvenile offenders and offenders aged 65 or over, finding sufficient justification in compliance with the requirements of Article 14 of the Convention. However, it was relatively divided in respect of the abolition of life sentences for adult female offenders while at the same time maintaining them for adult male offenders. I will therefore address only the last issue.

2. In finding justification for the difference in treatment the Court has taken note of various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, for protection of pregnancy and motherhood, as well as statistical data, provided by the Government, showing a considerable difference between the total number of male and female prison inmates and a relatively small number of persons sentenced to life imprisonment (see paragraph 82 of the judgment).

3. The minority rightly criticise the majority for carrying out a scant analysis of equality and gender issues and for avoiding a discussion of possible stereotypes and their implications (see paragraphs 45-48 of the judgment). In my opinion, the Court should not refrain from naming different forms of stereotyping and should always assess their invidiousness. It is impossible to change reality without naming it.[1] For this reason, in the present case it should be acknowledged that the respondent State's reasoning regarding the legislation exempting women from life imprisonment portrays women as a naturally vulnerable social group (see *Khamtokhu and Aksenchik v. Russia* (dec.) no. 60367/08, 961/11, § 22, 13 May 2014) and is therefore one that reflects judicial paternalism. In spite of this acknowledgment, I have voted with the majority. I find this to be a "hard case"[2] which requires broader contextual analysis relying on the principles enshrined in the Convention as a whole. In discussing the case I find it necessary to have regard to criminological and penological literature on gender and sentencing as well as potential remedies to redress alleged discrimination.

1. Catharine MacKinnon, "Women's Lives, Men's Laws" 89 (2005) ("[Y]ou can't change a reality you can't name").
2. See Ronald Dworkin, "Hard Cases", 88 Harvard L. Rev. 1057 (1975).

4. The criminological literature practically ignores female lifers, while comparative studies, which attempt to understand the experiences of female and male lifers in relation to one another, have been more or less non-existent.[3] Recent criminological research demonstrates that "the experience of serving a long life sentence has a gendered texture to it and while all prisoners feel the 'pains of imprisonment', 'gender' represents a key differentiating variable in shaping this experience."[4] Women in the study experienced the problems of long-term life imprisonment more severely than men across all analytical "dimensions" that were measured. For the "mental wellbeing" dimension, for example, the women's severity score was almost twice as high as the men's;[5] the women were significantly more likely to struggle with 'trust' and the absence of 'control' over their life in prison,[6] and 'losing contact with family and friends' ranked comparatively higher for them. In the Russian prison system the latter dimension might score much higher. The recent research of Russia's "inherited geography of penalty", in particular the impact of Russia's distinctive penal geography on prisoners' family relationships, demonstrates that when it is combined with traditional ideas about a woman's role that shape the penal service's management of female prisoners in Russia, it adds to their "pains of imprisonment".[7]

5. An overview of the criminological and penological literature reveals that in the twenty-first century questions of women's punishment are still fraught with confusion and contradiction in the ongoing struggle to make the punishment of women less damaging to themselves and their families

3. There has been a lack of interest in lifers in the literature since a number of classic sociological studies of the 1970s and 1980s.

4. See the recent study on gender and the pains of long-term imprisonment done by the Prison Research Centre, University of Cambridge, at https://prisonwatchuk.com/2016/01/19/gender-and-the-pains-of-long-life-imprisonment/. The study involved interviews with 126 men and 19 women who were serving life sentences in the UK with tariffs of 15 years or more, given to them when aged 25 and under. The article describing the results of the research is still in progress: Crewe, B., Hulley, S. and Wright, S. (2016, in progress) "The gendered problems of long-term life imprisonment".

5. The researchers themselves emphasised that men's tendency to report their problems as less severe could be connected to the culture of masculinity within prisons and they doubted that the men were under-reporting their "pain" in the survey. Ibid.

6. Stories of sexually threatening and inappropriate behaviour by male prison officers in women's prisons also fed into feelings in relation to these issues; such stories very rarely featured in men's accounts of their imprisonment. Ibid.

7. Authors Ms Pallot and Ms Piacentini (see Judith Pallot and Laura Piacentini, "Gender, Geography and Punishment - The Experience of Women in Carceral Russia" (Oxford University Press, 2012) convincingly argue that the use of geographical location through displacement in the Russian prison system (Russian prisoners, including women, are sent to serve their sentence far from their homes, families and any social support) is a form of punishment, and that this is especially true for female prisoners. Their argument is that the entire process of incarceration is punishment.

and more effective in diminishing the extent of social injury suffered.[8] While some penal reformers have argued in favour of the differential sentencing of men and women on the basis of dangerousness, legitimacy of punishment, and the value of their role in society, others have argued for the need for parity between provisions for female offenders coupled with gender-sensitive regimes. It follows from all this literature that formal equality in sentencing is not in itself a solution to the problem contemporary societies are facing in their penal systems when it comes to the female prison population[9]. Much more than equality in sentencing is required to achieve substantive and transitive equality between female and male offenders/prisoners – we cannot simply replicate what we provide for men and hope it will work for women. It is improbable that in the near future the Russian prison system will be reshaped in such a way as to approximately equalise the effects of life sentences for women and men and to avoid harming women sentenced to life disproportionately.[10]

6. In the present case the Court was faced with a real dilemma. The Government have indicated that in the event of a finding of a violation, levelling down would be a preferable remedy (see paragraph 42 of the judgment). When the Court finds a breach of the prohibition of discrimination enshrined in Article 14 read in conjunction with another Article of the Convention, even though there was no breach of that other Article when taken on its own (as emphasised in paragraph 53 of the judgment, Article 14 does not presuppose a breach of the substantive Article) there are two ways to rectify that violation. The benefit can either be taken away from all (levelling down) or extended to all (levelling up).[11]

---

8. See Pat Carlen, "Introduction: Women and Punishment" in "Women and Punishment – the struggle for justice", pp. 3-20, at p. 5 (ed. Pat Carlen, 2002).

9. In her report Lady Corston did not rule out the need for a separate sentencing framework for women at some time in the future, in the light of the statutory duty to take positive action to eliminate gender discrimination and promote equality under the Equality Act. However, she accepted that although that might be required in due course, at the time of writing her report it was not appropriate to make such a recommendation for the UK. See "The Corston Report – A report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system", § 4.11, Home Office, 2007, at http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf, last visited 28 November 2016.

10. This is not to say that prison conditions for male lifers in Russia are acceptable from the viewpoint of the Convention (forceful criticism of these conditions has been expressed in the *Khoroshenko* judgment and the concurring opinion of Judge Pinto de Albuquerque and myself annexed to it (see *Khoroshenko v. Russia* [GC], no. 41418/04), nor that it is not desirable to abolish life sentences for male prisoners as well. On the contrary, I see the abolition of life sentences as a Pareto optimal state in a democratic society that is guided by the principle of humanity.

11. On the dilemmas related to levelling down and levelling up in equality law, see Thomas Christiano, "The Constitution of Equality: Democratic Authority and its Limits (2008)"; Deborah L. Brake, "When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law", 46 William & Mary L. Rev. 513 (2004).

7. Contrary to the submissions of the third party (see paragraph 52 of the judgment), the Court has never construed Article 53 of the Convention[12] in the above-identified situations as obliging the member States to rectify the violation of Article 14 by levelling up rather than levelling down. In short, the Court has never declared levelling down in the above situations to be illegitimate. The Contracting States are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (see, among many other authorities, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B). In other words it reflects the subsidiary role of the Court. This applies even more to situations in which a member State voluntarily guarantees a right which is not a Convention right itself, as any preference for extension of benefits should in principle fall within the competence of the domestic authorities, who are, as often emphasised by the Court, better placed than an international judge to appreciate what is in the public interest (see *Khoroshenko v. Russia* [GC], no. 41418/04, § 120, ECHR 2015). This is especially true in situations in which the remedy of a violation involves statutory rules.

8. Requiring Russia to abolish life sentences for all would only be possible if the imposition of such sentences were in itself prohibited by or incompatible with Article 3 or any other Article of the Convention, which is not the case at the present time (see paragraph 72 of the judgment).

9. Both remedies – levelling down and levelling up – result in formal equality, but they do not necessarily produce equally desirable results. In the context of the present case levelling down is a problematic remedy for several reasons. First, it would leave adult female offenders worse off without making adult male offenders better off. Second, identical punishment does not always mean equal punishment and thus mere

12. According to the Court's interpretation, Article 53 of the Convention allows the States Parties the possibility of offering to the persons falling under their jurisdiction more extensive protection than that required by the Convention (see, for example, *Suso Musa v. Malta*, no. 42337/12, § 97, 23 July 2013, and *Okyay and Others v. Turkey*, no. 36220/97, § 68, ECHR 2005-VII). Hence, the Convention reinforces the protection afforded at national level, but never limits it (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 28, *Reports of Judgments and Decisions* 1998-I; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 500, ECHR 2005 III; and *Micallef v. Malta*, no. 17056/06, § 44, 15 January 2008). The Court has emphasised many times that when the member States take measures to protect individuals which fall within the ambit of one of the rights protected by the Convention, but go beyond that required by the Convention the State cannot apply those measures in a discriminatory manner (see, mutatis mutandis, *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (Merits), judgment of 23 July 1968, Series A no. 6, § 9).

enforcement of formal equality would still not necessarily accomplish substantive equality. Third, what is at stake in the present case is not a trivial matter, since levelling down would reverse progress in restricting the application of life sentences.

10. In situations where levelling down is not desirable and/or acceptable and levelling up is most likely inachievable and in which at the same time formal equality does not necessarily lead to substantive equality it might be preferable to choose a state in which some are better off and none are worse off than under the best feasible equality. This is particularly true in the present case where what is at stake is of such fundamental importance.

11. Although the Court was unable to discern an international trend either in favour of or against abolishing life imprisonment, it has identified exemption from life imprisonment as a progressive evolution of society in penological matters (see paragraph 86 of the judgment). Life imprisonment as the ultimate sanction gives rise to many of the same objections as the death sentence. Thus I fully agree with Judge Nußberger and Judge Mits that it was important for the Court to look at this case from the broader perspective, taking into consideration the spirit of the Convention as a whole as an instrument advancing human rights (see paragraphs 73 and 75 of the judgment). The right to human dignity has had an impact in that life imprisonment is now considered acceptable in Europe only under certain conditions (see *Vinter and Others v. United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 113, and *Murray v. Netherlands* [GC], no. 10511/10, § 101). Serious arguments plead in favour of the abolition of life imprisonment. Gradual abolition, targeting groups that are more vulnerable to the harmful impact of life sentences, should be tolerated as a step towards its complete abolition in so far as that difference in treatment does not additionally harm those to whom life imprisonment continues to apply. Since I do not find other reasons of principle, except for formal equality, which for me is not sufficient to find a violation in the present case, I have voted with the majority.

12. Life imprisonment is symbolic of punishment for the most serious crimes. Unfortunately, as we know, symbols take time to disappear.[13]

13. Gauthier de Beco, "Life sentence and human dignity", 9 International Journal of Human Rights 411, 418 (2005).

CONCURRING OPINION OF JUDGE MITS

This case is more complicated than it may seem at first glance. If approached exclusively from the narrow perspective of discrimination it may lead to one conclusion. However, the issue raised in this case far exceeds the individual interests of the applicants. If approached from the broader perspective of the object and purpose of the Convention (in the sense of the maintenance and further realisation of human rights as stipulated in the Preamble), the outcome may be different. The subject matter of this case necessitates taking the broader approach.

There is no obligation on the member States under the Convention to abolish life imprisonment (see paragraphs 74 and 87 of the judgment). The Russian Government made it clear that they intended to maintain life imprisonment (see paragraph 42). Should the Government be required, in the name of equality, to treat the privileged groups (young offenders, offenders aged over 65 and female offenders) the same way as the group subjected to life imprisonment, this would lead to extending the application of life imprisonment to all groups. Thus, without any change for the applicants, the other groups would be subjected to harsher punishment. This would be an absurd result and at odds with the idea of the protection of human rights. The privileged groups do not claim that they are denied the enjoyment of a right to a harsher punishment.

The applicants claimed that there was an emerging international trend towards abolition of life imprisonment (see paragraph 41). The Court could not discern a trend either towards abolition or support for life imprisonment, but observed that in Europe life imprisonment has become limited through the requirement of reducibility of the sentence, which may entail further positive obligations on the part of the member States (see paragraph 86). Therefore, at this moment in time the process related to life imprisonment cannot be equated with the developments which finally led to the abolition of the death penalty. However, a process moving in the direction of the maintenance and further realisation of human rights should not be discouraged, as it certainly would be if the above-described scenario were implemented.

This is why, dealing with the question of importance for the whole of Europe and beyond, the concept of discrimination has to be seen in the context of the object and purpose of the Convention, or, as the Court put it, it must “interpret the Convention in a harmonious manner and in conformity with its general spirit” (see paragraph 87). After all, this case raises the question: how do we understand the protection of human rights and fundamental freedoms in Europe?

JOINT PARTLY DISSENTING OPINION OF JUDGES SICILIANOS, MØSE, LUBARDA, MOUROU-VIKSTRÖM AND KUCSKO-STADLMAYER

(Translation)

1. We subscribe without reservation to the finding of no violation of Article 14 of the Convention, taken in conjunction with Article 5, regarding the difference in treatment based on age. Indeed we think that the reasons stated for not providing for life imprisonment where juvenile offenders and offenders aged 65 or over are concerned constitute objective and reasonable justification for the difference in treatment between those categories of offender and men aged 18 to 65 (see, in particular, paragraphs 69-81 of the judgment). However, we are unable to agree with the majority's finding that there has been no violation of Article 14 taken in conjunction with Article 5 regarding the difference in treatment on grounds of sex (see paragraphs 82 et seq. of the judgment).

I. The principle: only "very weighty reasons" justify a difference in treatment on grounds of sex

2. We would point out in this regard that the Court has repeatedly held that differences based exclusively on sex require "very weighty reasons", "particularly serious reasons" or, as is sometimes said, "particularly weighty and convincing reasons" by way of justification (see, for example, *Van Raalte v. the Netherlands*, 21 February 1997, § 39 *in fine*, *Reports of Judgments and Decisions* 1997-I; *Petrovic v. Austria*, 27 March 1998, § 37, *Reports* 1998-II; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2005-X; and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts), and the references cited in that judgment). Where a difference in treatment is based on sex the State's margin of appreciation is narrow (see *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013, and *Vallianatos and Others*, cited above, § 77). In that vein the Grand Chamber has emphasised more particularly "that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and that very weighty reasons would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex"

(see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts)). The Court has also observed that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition (ibid., § 140). It has concluded from this that a general and automatic restriction applied to a group of people on the basis of their sex, irrespective of their personal situation, falls outside any "acceptable margin of appreciation, however wide that margin might be", and is therefore "incompatible with Article 14" (ibid., § 148).

3. We observe that these important ideas do not appear in the general principles of the present judgment (see paragraphs 64-65), but further on – in an abridged version – in paragraph 78. The judgment also refers to the "general spirit" of the Convention, which is not precisely defined (see paragraph 73), and to its "internal consistency" (see paragraph 75), which appear to take precedence over the principle prohibiting discrimination on grounds of sex, as defined by that case-law.

II. Application of that principle to the present case: the grounds relied on

4. Accordingly, it is important to examine more closely the arguments advanced by the Government and endorsed by the majority to justify the difference in treatment in question. These arguments are based on the relevant European and international instruments (A), statistical data provided by the Government (B) and apparently prevailing trends in Europe (C). We will study these arguments in turn.

(A) International and European instruments

5. The first argument advanced to justify the difference in treatment on grounds of sex is inspired by "various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood" (see paragraph 82 of the judgment). The relevant provisions of the instruments in question are cited *in extenso* in paragraphs 27 to 31 of the judgment. The main ones are Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Rules for the Treatment of Women Prisoners (Bangkok Rules), the European Parliament's Resolution of 13 March 2008 on the particular situation of women in prison, and the Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to member States on the European Prison Rules. Article 4 of the CEDAW –

the only binding provision, to which we will return – generally concerns special measures. The other instruments are not binding.

(1) Non-binding texts

6. The non-binding texts mainly concern the conditions of detention of women, and particularly pregnant women, breastfeeding women and mothers with young children. We fully endorse the humane considerations underlying these instruments. We cannot but observe, however, that the relevant provisions of these instruments do not in any way relate to the question whether life imprisonment should or should not be imposed on women, or even, more generally, questions of criminal policy towards women. However, the provisions cited in paragraphs 23 to 26 of the judgment focus on the prohibition on imposing certain sentences – particularly capital punishment and life imprisonment with no possibility of release – on persons under the age of 18.

7. In other words, whilst where juvenile offenders are concerned the relevant international texts do concern the particular aspect that is the subject of the present case, the provisions cited relating to women mainly concern a different subject, namely, the conditions of their detention and that of other categories of women who are particularly vulnerable (pregnant women, breastfeeding women and mothers with young children). Consequently, the above-cited instruments apply to *the execution* of any prison sentence imposed on women, irrespective of its length. They do not concern *the imposition* of life imprisonment. Moreover, they are intended to protect only women in certain *specific situations* (pregnancy, maternity) and are not intended for all women, purely on account of their sex. Their alleged "natural vulnerability", their "special role in society" and their "reproductive function", referred to by the Government to justify their reasoning (see paragraphs 46 and 47 of the judgment), are not the subject of these rules. In any event the texts in question do not appear to us to amount, as such, to a "very weighty reason", still less a "particularly serious reason", justifying the difference in treatment on grounds of sex.

(2) Article 4 of the CEDAW and the legal nature of the impugned measures

8. The same is true of Article 4 of the CEDAW. In analysing the first paragraph of that provision, concerning "temporary special measures", the Committee for the Elimination of All Forms of Discrimination against Women aptly observed that, amongst the "fundamental obligations" that were "central to States parties' efforts to eliminate discrimination against women", was the effort to "address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions" (General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of

Discrimination against Women, on temporary special measures, United Nations doc. A/59/38 (Part I), Annex I, paragraphs 6-7).

9. In our opinion, that statement is of major importance in understanding the object and purpose of the CEDAW in general and the scope of Article 4 of that Convention in particular. This provision concerns "temporary special measures" (paragraph 1) and "special measures" aimed at protecting maternity (paragraph 2).

10. As is explained in the General recommendation cited above, the "temporary special measures" are mainly aimed at achieving equality of opportunity and, accordingly, at achieving women's *de facto* equality with men, that is to say substantive equality (ibid., paragraph 8). The measures in question are temporary in that they "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved" (Article 4, paragraph 1, of the CEDAW). The same provision also stipulates that the adoption of temporary special measures "shall in no way entail as a consequence the maintenance of unequal or separate standards". Yet the measures in issue here sit uneasily with the purpose of this provision. Furthermore, they are legislative measures that are designed to be permanent, creating distinct legal rules for female prisoners. It therefore appears that the measures in question do not amount to "temporary special measures" within the meaning of Article 4, paragraph 1, of the CEDAW. That provision is therefore inapplicable in their regard.

11. Article 4, paragraph 2, of the CEDAW states that the adoption of "special measures, including those measures contained in the present Convention, aimed at protecting maternity" shall not be considered discriminatory. The protection of maternity appears in Article 5 b) of the CEDAW, which stipulates that States Parties "shall take all appropriate measures ... to ensure that family education includes a proper understanding of maternity as a social function". However, the provision *par excellence* in this area is the one contained in Article 11, paragraph 2, pursuant to which the States Parties undertake to take appropriate measures to prohibit, "subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave" and to introduce "maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances". It would thus appear that the measures provided for by the CEDAW to protect maternity relate to family relationships and the field of employment law. However, even if Article 4, paragraph 2, of the CEDAW were to be construed more broadly, the provisions designed to protect women in terms of "pregnancy and maternity" require – as an exception to the principle of non-discrimination – a very strict interpretation. This was indicated by the CJEU in the judgment *Johnston*, C-222/84, § 44, in the context of Council Directive 76/207/EEC (see also *Brown*, C-394/96, § 17; *Commission/Austria*, C-203/03, §§ 43-45; and *Stoeckel*, C-345/89, §§ 14-19). It is clear from this case-law that

measures for the protection of maternity must always be adapted to the real and specific risks of different situations and do not justify an extension to the female sex as such. Beyond that, it is doubtful whether physical condition or family responsibilities can – whether for women or men – justify mitigation of a sentence that is proportionate to the offence.

12. Moreover, the other provisions cited in paragraphs 29-31 of the judgment – concerning in particular, let us not forget, the conditions of detention of pregnant or breastfeeding women, and of mothers with young children – focus on hygienic conditions, health-care services, diet and antenatal and postnatal care. In other words, the measures provided for by the international instruments to which the Court has had regard are very different in nature from that of the provisions complained of.

13. Accordingly, we find it difficult to accept that the fact of prohibiting life imprisonment and providing for a maximum term of imprisonment of twenty years for women (see Article 57 of the Russian Criminal Code, referred to in paragraph 16 of the judgment) amounts to a "special measure" aimed at protecting maternity within the meaning of Article 4, paragraph 2, of the CEDAW. Legitimate doubts can be raised in this regard, especially as even in the case of a twenty-year prison sentence the prospect of maternity will usually be compromised. It is significant, moreover, that neither the majority nor the Constitutional Court explicitly qualified the difference in treatment in question as a "special measure" aimed at protecting maternity. To quote the Russian Constitutional Court, the prohibition of the imposition of life imprisonment on women is more generally justified by their "social and physiological characteristics ... on the basis of the principles of justice and humanity in the criminal law" (see paragraph 18 of the judgment).

(B) The statistical data

14. The second argument highlighted by the majority for considering that there is justification for the difference in question concerns the statistical data submitted by the Government indicating a considerable difference between the total number of convicted male and female prisoners. The data in question also show that the number of convicted offenders sentenced to life imprisonment is small (see paragraph 48 of the judgment). Without wishing to analyse that data and the penalogical rationale justifying a difference in treatment between men and women in that respect, the Court says it is prepared to accept that in the circumstances of the present case the data in question as well as the above-mentioned elements (taken from the international and European instruments examined above) provide a sufficient basis for the Court to conclude that there exists a public interest underlying the exemption of female offenders from life imprisonment by way of a general rule (see paragraph 82 of the judgment).

15. With all respect to the majority, we do not think that the arguments drawn from the statistical data are "very weighty" or "particularly weighty and convincing" and can thus justify a difference in treatment on grounds of sex (see paragraph 2 above). We observe, firstly, that the statistical data concern purely quantitative aspects. They say nothing about the possibility of women committing particularly serious crimes. Above all, they ignore the overriding importance of the personal situation of offenders when determining sentence. This approach, involving the conceptualisation and individualisation of legal treatment is, moreover, fully assimilated into the aims of contemporary feminism.

16. Moreover, the two main trends illustrated by the above-mentioned statistical data – the disproportionate male/female ratio in the prison population and the low number of convicted offenders sentenced to life imprisonment – are not peculiar to Russia. Indeed the Council of Europe's most recent penal statistics show that these two trends can be observed in all the member States. More specifically, according to the statistics in question, female prisoners in Russia represent 8.2% of all prisoners in the country – a figure which approximately corresponds to the data provided by the Government – whilst the European average is 5% (Council of Europe, *Annual Penal Statistics. SPACE I – Prison Populations*, doc. PC-CP (2015)7, 23 December 2015, p. 64). In other words, the disproportionate ratio referred to by the Government is actually greater at pan-European level than in Russia. Furthermore, with regard to convicted offenders sentenced to life imprisonment as compared with the prison population as a whole, the Council of Europe's statistics show that the European average is around 1.6% (ibid., p. 97). Like Russia, this percentage reflects the low number of convicted offenders belonging to this category. Accordingly, we do not think it is possible to detect in this statistical data any particular feature with regard to Russia that would constitute a weighty argument for justifying the difference in question. In that connection we would point out that once a difference in treatment has been demonstrated under Article 14, it is for the Government to prove that it was justified (see the recent judgment delivered in the case of *Biao v. Denmark* [GC], no. 38590/10, § 61, ECHR 2016).

(C) The "disparity in approach" at European level

17. The third argument advanced to justify the difference in treatment in question concerns "the disparity in approach" that can be observed among the States Parties to the Convention. On that subject the majority point out that nine Contracting States have abolished life imprisonment, while other States provide for varying age limits. With regard to women, certain member States exempt female offenders who were pregnant at the time of the offence or at the time of sentencing, while others, including Russia, have extended that approach to all female offenders. According to the majority, a

"wide margin of appreciation" must therefore be left to the authorities of each State (see paragraphs 83-85 of the judgment).

18. It is true that, according to the Court's case-law, where there is a lack of common ground between the domestic legal systems of the Contracting States this will in theory lead to an acknowledgment of a wide margin of appreciation in favour of the national authorities. In the area under consideration there is no doubt that the national legislatures have a wide margin of appreciation regarding the question whether provision should be made for life imprisonment. The States also have a substantial margin of appreciation to determine which crimes carry that sentence, it being understood, however, that, in accordance with the principle of proportionality, only particularly serious crimes deserve such punishment. However, where differences are made between offenders placed in analogous or relevantly similar situations, as in the present case women and men may be (see paragraphs 66-68 of the judgment), the margin of appreciation narrows according to the criterion for the differential treatment. We can never over-emphasise the point that, according to the Court's well-established case-law, differences based exclusively on sex require "very weighty reasons", "particularly weighty and convincing reasons" or even "particularly serious reasons" by way of justification (see paragraph 2 above).

19. Furthermore, in order to answer the question whether or not there is common ground amongst the member States of the Council of Europe (or whether a particular trend can be detected), the subject must be properly circumscribed and, accordingly, the group of States constituting the point of reference. In other words, in order to reply to that question, a comparison has to be made between what is truly comparable (see, *mutatis mutandis, Vallianatos and Others*, cited above, §§ 26 and 91). Mixing different elements would be liable to impair the methodological clarity and lead to hasty conclusions. In the present case, what is important is to know whether there is justification for exempting female offenders from life imprisonment by way of a general rule. Consequently, the reference group is the one composed of the States which make provision in their legislation for the penalty in question. We observe that of the thirty-seven member States of the Council of Europe in which convicted offenders can be sentenced to life imprisonment, only Albania, Azerbaijan and the Republic of Moldova (in addition to Russia) generally exempt female offenders from this sentence in their criminal law (see paragraphs 20 and 22 of the judgment). It thus appears that there is a large majority of States which do *not* exempt female offenders from life imprisonment by way of a general rule.

III. Final remarks

20. We have closely examined the reasons relied on by the majority for justifying the differential treatment in question. We do not think that the considerations in question – taken in isolation or even together – are sufficiently weighty to amount to such justification. We therefore consider that in the present case there has been a violation of Article 14 taken in conjunction with Article 5 of the Convention.

21. That being said, it should also be pointed out that this approach would not necessarily confront the respondent State with a dilemma consisting in either purely and simply abolishing life imprisonment or, alternatively, extending it to women. There are also other avenues which would involve a certain adjustment of the sentence in question and the means of its enforcement, and which would be advantageous to both women and men. It should also be observed, lastly, that the fact of providing for life imprisonment in the legislation does not mean that the sentencing judge cannot take account *in concreto* of the specific situation in question, including the vulnerability of a particular person, be it a man or woman.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

(Translation)

Table of contents

I. Introduction (§§ 1-3)

1. The case *Khamtokhu and Aksenchik v. Russia* once again obliges the European Court of Human Rights ("the Court") to face up to the crucial question of life imprisonment, on the basis of an assessment of the compatibility of Article 57 § 2 of the Russian Criminal Code with the European Convention on Human Rights ("the Convention"). This case is all the more fundamental in that, in parallel, it raises complex questions regarding the implementation of policies of positive discrimination in the light of Convention standards.

2. However, the majority did not consider it necessary to examine more closely the particular aspects of the right not to be discriminated against that were in issue in the present case, thus missing an opportunity to clarify these fundamental principles. Nor did it seize the opportunity it was given to develop the protection offered by the Convention by making a further decisive step towards the abolition of life imprisonment.

3. This opinion, which is devoted to an examination of these two issues, will show that there is an inconsistency in the Russian policy of positive discrimination in favour of perpetrators of certain offences and that retaining the provision for life imprisonment in the Russian Criminal Code is incompatible with the Convention. For both these reasons I cannot subscribe to the finding of no violation of Article 14 taken in conjunction with Article 5 of the Convention.

First part (§§ 4-24)

II. The legitimacy of the objective of protecting vulnerable groups (§§ 4-17)

A. The protection of women in international and European law (§§ 5-11)

4. This opinion does not in any way seek to call into question the praiseworthy and necessary efforts of political will to establish public policies for the protection of women, juveniles and old people. This is a fundamental premise which must be stated from the outset so that the following comments are understood in their proper context. The fight against discrimination on the grounds of sex and age is an essential objective on the part of public authorities and is firmly enshrined in international standards.

5. It is an undeniable fact that, even nowadays, women are in some respects a vulnerable group and subject to less favourable conditions than their male counterparts. Whether it be a question of protecting their physical and moral integrity from specific interferences or ensuring their equal

access to education and employment, or any other aspect of economic, social and cultural life, the State authorities have a duty to take concrete and effective action to ensure genuine equality between men and women. In particular, prison systems rarely take account of women's particular needs, such as in terms of policies regarding the classification or placement of prisoners, programmes or services catering for their needs, sufficient numbers of specialised staff or specific conditions related to health, hygiene and antenatal or postnatal care, and to care of children in prison.[1] It is therefore unsurprising that international instruments and the bodies responsible for ensuring their application are heavily involved in this process. Moreover, the Court itself has taken pains to point out that "the advancement of gender equality is today a major goal in the member States of the Council of Europe"[2].

6. Human rights instruments of general application, such as, in particular, the International Covenant on Civil and Political Rights ("ICCPR" – Article 2), the American Convention on Human Rights (Article 1) or the African Charter on Human and Peoples' Rights (Article 2) unanimously prohibit discrimination on grounds of sex. Furthermore, Article 6 § 5 of the ICCPR prohibits the imposition of capital punishment on pregnant women, as does Article 76 § 3 of Additional Protocol I to the Geneva Convention of 1949. With regard to protection of categories of person, the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("the CEDAW") seeks to prohibit discrimination against women in both the public and the private sphere and imposes a duty on the States Parties, under Article 2, "to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) provide for the allocation of separate premises to female prisoners and special provisions for the conditions of detention of pregnant and breastfeeding women, a prohibition on using solitary confinement or other similar measures, a prohibition on using instruments of restraint on women during labour, childbirth and immediately after childbirth, and contain provisions on female staff members and access by male staff members to the part of the prison set aside for women (Rules 11 (a), 28, 45 (2), 48 (2), 58 (2), 74 (3), and 81 (1)-(3)). The United Nations Rules for the Treatment of Women

1. The organisation Penal Reform International and the Association for the Prevention of Torture state that "the high risk women face of ill-treatment and torture in places of deprivation of liberty is not an issue that can be resolved only by focusing on those places. The root causes of women's vulnerability in detention are often to be found outside the prison walls, though such vulnerability is intensified significantly in places of deprivation of liberty" (Penal Reform International and Association for the Prevention of Torture (2013), *Women in Detention: a guide to gender-sensitive monitoring* http://tinyurl.com/PenalReform-wid-2013).

2. See *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts).

Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules) state the need to give priority to applying non-custodial measures to women who have come into contact with the criminal justice system. Some of these rules specify how the existing provisions of the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) apply to women prisoners and women offenders, while others address new questions belonging to criminal law. With regard to the Council of Europe's own sources of law, reference should be made to the succinct references to the situation of women prisoners appearing in Recommendation (2003)23 of the Committee of Ministers on the management by prison administrations of life-sentence and other long-term prisoners and in the European Prison Rules adopted by the Committee of Ministers Recommendation Rec (2006)2. Lastly, with regard to European Union law, mention should be made of the position taken by the European Parliament in its Resolution of 13 March 2008 on the particular needs of pregnant women and mothers in prison.

7. Accordingly, the necessity and legitimacy of the specific protection of women by the public authorities and international bodies are not in doubt. I have already expressed my belief that "the full *effet utile* of the European Convention on Human Rights can only be achieved with a gender-sensitive interpretation and application of its provisions which takes into account the factual inequalities between women and men and the way they impact on women's lives"[3]. The following remarks must therefore not be construed as a disavowal of that belief.

8. Nonetheless, and without minimising the fundamental importance of the fight against discrimination suffered by women on grounds of their sex, that protection should not serve as a pretext for constantly viewing women as victims which would be damaging to their cause and would end up being counterproductive. One of the main pitfalls facing the protection of this category is precisely the perpetuation of age-old prejudices regarding the nature or role of women in society. Perpetuating such thought patterns may turn out to be just as dangerous as the social disadvantages affecting women as compared with men since they contribute to maintaining the belief that there is an innate difference in aptitude between the sexes. For that purpose Article 5 of the CEDAW imposes a duty on the States Parties to take all appropriate measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

3. See my concurring opinion in *Valiulienė v. Lithuania*, no. 33234/07, 26 March 2013.

9. The Court's case-law is unequivocal in this respect[4]. In the case of *Ünal Tekeli v. Turkey*, regarding the extension of a husband's surname to his wife, it stated as follows: "that tradition derives from the man's primordial role and the woman's secondary role in the family. Nowadays the advancement of the equality of the sexes in the member States of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-discrimination, prevent States from imposing that tradition on married women"[5].

10. Similarly, in *Konstantin Markin v. Russia*, which concerned the refusal to grant parental leave to male military personnel, the Grand Chamber stated that "references to traditions, general assumptions or prevailing social attitudes in a particular country [were] insufficient justification for a difference in treatment on grounds of sex"[6]. In that connection the Court held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention on account of the difference in treatment between men and women on that basis. Further, in response to the respondent Government's argument seeking to justify that measure on grounds of "positive discrimination" intended to correct the "factual" disadvantaged position of women in society, the Court said that "such difference ha[d] the effect of perpetuating gender stereotypes and [was] disadvantageous both to women's careers and to men's family life"[7], also pointing out that "States could not "justif[y] [that difference in treatment] by reference to traditions prevailing in a certain country" and "[could] not impose traditional gender roles and gender stereotypes"[8].

11. It is therefore fundamentally important to stress that an unjustified differentiation between men and women, in the sense that it is not based on an actual factual disadvantage but on a preconceived idea of the supposed weaknesses of the latter as compared with the former, would have the effect not of reducing inequalities but perpetuating, or even exacerbating them. It would appear that the majority, in the present case, confined themselves to one aspect only of the fight against discrimination without having regard to that specific issue in an overall context.

B. The protection of juveniles and old people in international and European law (§§ 12-17)

12. Having regard to both their physiological and their social characteristics, young people, like old people, may, in certain

4. See, in particular, *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and Schuler-*Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263.
5. See *Ünal Tekeli v. Turkey*, no. 29865/96, § 63, ECHR 2004-X (extracts).
6. See *Konstantin Markin v. Russia*, cited above, § 127.
7. Ibid., § 141.
8. Ibid., § 142.

circumstances, require special protection by the national authorities. The present opinion does not in any way set out to call into question that essential objective of public policy, enshrined both in international law and in European human rights law.

13. Whilst the protection of juveniles is the subject of many international instruments, the reference text in this area remains the United Nations Convention of 1990 on the Rights of the Child, the Preamble to which states, *inter alia*, that "the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in Article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children". Furthermore, Article 37 a) of the Convention on the Rights of the Child, Article 6 § 5 of the ICCPR and Article 26 of the Rome Statute of the International Criminal Court prohibit the imposition of the heaviest penalties on persons below eighteen years of age. Article 14 § 4 of the ICCPR identifies rehabilitation as the main purpose of criminal justice for juveniles

14. The detention of juvenile offenders is the subject of specific regulations, particularly through instruments of soft law[9]. Thus, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) of 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) of 1990, the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) of 1990, the Guidelines for Action on Children in the Criminal Justice System recommended by Economic and Social Council resolution 1997/30 of 1997, the Guidance Note of the Secretary-General: United Nations approach to Justice for Children of 2008, the United Nations Guidelines for the Alternative Care of Children of 2009, and the Principles relating to the Status of National Institutions to promote and protect human rights (the Paris Principles) and, regarding the institutions of the Council of Europe, the Recommendation of the Committee of Ministers of the Council of Europe No. R (87) 20 on social reactions to juvenile delinquency, the Committee of Ministers Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, the Committee of Ministers Recommendation Rec(2003)23 on the management by prison administrations of life-sentence and other long-term

9. See, in this connection, my partly dissenting opinion, jointly with Judges Popović and Karakaş, in the case of *Ertuş v. Turkey*, no. 37871/08, 5 November 2013.

prisoners, the Committee of Ministers Recommendation Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, the Committee of Ministers Recommendation Rec(2009)10 on Council of Europe Policy guidelines on integrated national strategies for the protection of children from violence and the Committee of Ministers' Guidelines on child-friendly justice adopted on 17 November 2010, establish the standards which the States must apply to these particular situations. There is no doubt that the imprisonment of persons under eighteen is subject to substantially different standards from those applicable to adults, concerning substantive criminal law or procedural law, or prison law, or even other areas of law. Rule 15 of the European Rules for Juvenile Offenders is symptomatic of this holistic vision, providing that "[a]ny justice system dealing with juveniles shall follow a multi-disciplinary and multi-agency approach and be integrated with wider social initiatives for juveniles in order to ensure a holistic approach to and continuity of the care of such juveniles (principles of community involvement and continuous care)".

15. With regard to life imprisonment of juvenile offenders, Article 37 a) of the Convention on the Rights of the Child provides that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age". The soft law instruments are also clear in this respect. The General Assembly of the United Nations has called on States since 2008 "to abolish by law and in practice the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence[10]. In 2012 it again urged States "to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release, nor corporal punishment as a sentence or as a disciplinary measure, [was] imposed for offences committed by persons under 18 years of age ... to consider repealing life imprisonment with the possibility of release for offences committed by persons under 18 years of age"[11]. In its General Comment No. 10, the Committee on the Rights of the Child pointed to "the likelihood that a life imprisonment of a child [would] make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release"; it "strongly recommend[ed] the States parties to abolish all forms of life imprisonment for offences committed by persons under the age of 18"[12]. Lastly, within the Council of Europe, the Committee of Ministers Recommendation Rec(2003)23 refers, with regard to the

10. UNGA Resolution of 24 December 2008, A/RES/63/241.
11. UNGA Resolution of 9 November 2012, A/C.3/67/L.34.
12. Committee on the Rights of the Child, Children's rights in juvenile justice, General Comment No. 10, 25 April 2007, CRC/C/GC/10.

regime and sentence planning for juveniles, to the principles laid down in the above-mentioned United Nations Convention (see paragraph 32).

16. International law also provides, albeit to a lesser extent, instruments for the protection of old people. Although the international authorities have become aware of the phenomenon of ageing of the world population and of the specific problems this entails[13], at the present time there is no specific convention dedicated to the protection of this sector of the population. Certain instruments, which are of general scope and binding in nature, prohibit discrimination on grounds of age and accordingly offer protection to older persons, as provided for in Article 21, first paragraph, of the Charter of Fundamental Rights of the European Union and Article 1 of the International Convention on the Protection of all Migrant Workers and their Families. The CEDAW, for its part, refers in sub-paragraph e) of Article 11, paragraph 1, to retirement and old-age benefits which directly concern this group. Lastly, Article 25 § b) of the Convention on the Rights of Persons with Disabilities calls on States to provide "services designed, among other things, to minimize and prevent further disabilities, including among children and older persons" and Article 28 § 2 b) to ensure "access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes". Soft law instruments offer more comprehensive protection for this sector of the population. The Vienna Plan of Action on Ageing of 1982 and the Madrid Plan of Action on Ageing of 2002, the United Nations Principles for Older Persons adopted in 1991 in the General Assembly Resolution 46/91 and the Toronto Declaration on the Global Prevention of Elder Abuse (World Health Organisation) of 2002 are devoted to specific issues related to ageing. Among the instruments offering specific protection to old people mention can also be made of the ILO Older Workers Recommendation R162[14] and Invalidity, Old-Age and Survivors' Benefits Recommendation R131[15], the Committee on Economic, Social and Cultural Rights General Comments No. 6: the Economic, Social and Cultural Rights of Older Persons[16] and No. 20: Non-discrimination in economic, social and cultural rights[17] and the Committee on the Elimination of Discrimination against Women General Recommendation No. 27 on older women and protection of their human rights[18].

13. See the Report of the Secretary-General of the United Nations to the UNGA on the Follow-up to the Second World Assembly on Ageing, 22 July 2011, A/66/173.
14. Adopted in Geneva on 23 June 1990.
15. Adopted in Geneva on 29 June 1967.
16. 8 December 1995, E/1996/22.
17. 2 July 2009, E/C.12/GC/20.
18. 16 December 2010, CEDAW/C/GC/27.

17. Among the instruments establishing standards in respect of detention, certain take into account the specific situation of old people[19]. An example of this is Principle No. 5 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in Resolution 43/173 of 9 December 1988, which provides that "[m]easures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory". Likewise, Recommendation Rec(2003)23 of the Committee of Ministers of the Council of Europe on the management by prison administrations of life-sentence and other long-term prisoners indicates, *inter alia*, in paragraph 28 that "elderly prisoners should be assisted to maintain good standards of physical and mental health". However, whilst specific provisions exist with regard to adapting the conditions of detention of elderly prisoners to their specific needs, particularly from a medical point of view, there is nothing in international law to indicate that they should benefit from a special regime under substantive criminal law, particularly at the stage of determination of sentence.

III. Justification for the difference in treatment of vulnerable groups (§§ 18-24)

A. Obligation of positive discrimination (§§ 18-21)

18. The root of the prohibition of discrimination stipulated in the Convention lies in the concept of equality. Article 14 formally enshrines the equality of citizens as follows: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The Court has never derogated from the principle according to which this Article "safeguards individuals, placed in similar situations, from any discrimination"[20]. Furthermore, the pursuit of equality in the application of the rights protected pervades the Convention to such an extent that the Court has considered that "[i]t is as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms"[21]. Accordingly, there can be no doubt as to the central

19. On this subject, see the edifying Human Rights Watch report, *Old behind bars: the ageing prison population in the United States*, 2012, and the study by Tourat and Désesquelles, *La prison face au vieillissement*, 2016 (http://www.gip-recherche-justice.fr/).
20. See *Marckx v. Belgium*, 13 June 1979, § 32, Series A no. 31.
21. Ibid.

place occupied by the promotion of equality within the European system for the protection of human rights. I have already had the opportunity to underscore the importance of this "general principle of equality" in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, and to emphasise the extent to which it permeates the whole European human rights protection system[22].

19. However, the concept of equality is complex when it comes to its implementation in that it breaks down, empirically, into two separate components. The first consists in legally guaranteeing the same rights to all citizens. This is therefore purely "formal" equality as it does not take account of the pre-existing situation. The second, "real", component of the principle of equality seeks to overcome that deficiency by aiming at achieving factual equality between individuals. The aim is therefore to offset initial inequalities in order to achieve, *in fine*, equal situations notwithstanding the original differences in each one's situation. Equality corresponds here to Aristotle's conception of justice. The concept of real equality thus refers to the idea of "distributive" justice since the application of equal treatment to persons in unequal situations would be fundamentally unjust: persons in unequal situations must be treated unequally in order to re-establish equality. It is therefore sometimes necessary, for the purposes of achieving the objective of equality, to introduce a form of inequality. This is what the Court already clearly established in the *Belgian linguistic case*, when it stated that "moreover, certain legal inequalities tend only to correct factual inequalities"[23].

20. This is exactly what positive discrimination policies aim to do: break with formal equality in order to achieve real equality of the persons concerned, through temporary measures designed to create equality of opportunity or treatment. Once that equality is achieved, the temporary measures lose their legitimacy[24]. Thus in the name of non-discrimination a difference in treatment is required or, as summed up by Kelsen, "where individuals are equal, or, to be more precise, where individuals and external circumstances are equal, they must receive equal treatment, and where individuals and external circumstances are unequal, they must receive different treatment"[25]. Such action is compatible with the Convention, as

22. See my opinion (§ 9) in the case of *Centre for legal resources on behalf of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, ECHR 2014).

23. See *Case "relating to certain aspects of laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 10, Series A no. 6.

24. CEDAW General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, United Nations, A/59/38 (1st part), Annex 1); General Comment No. 18, article 26: Principle of equality, UN Doc. HRI/GEN/1/Rev.1 (1994), § 10; and The Equal Rights Trust Declaration of Principles on Equality, 2008, Principle 3.

25. Hans Kelsen, *Justice et droit naturel*, *Le droit naturel - Annales de philosophie politique*, vol. III, 1959, p. 50.

expressly provided for in the Preamble to Protocol No. 12[26]. The Court has recently reaffirmed this in the case of *Andrle v. the Czech Republic*, in which it stated that "Article 14 does not prohibit a member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article"[27].

21. Even in this type of situation, however, the Convention requires that the difference in treatment be justified on objective and reasonable grounds and proportionate to the legitimate aim pursued. The Court clearly indicated as much in the case of *Stec and Others v. the United Kingdom*[28], precisely with regard to positive discrimination allegedly implemented by the respondent State to re-establish equality between the sexes. It pointed out in that case that despite the possibility, or even the necessity, of putting such policies in place in certain cases, "[a] difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized"[29]. Furthermore, it specified that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention"[30]. The Court has already acknowledged that age is a concept that is also covered by Article 14[31] and which must be taken into consideration in determining sentence[32]. Consequently, differences in treatment as a result of concern on the part of the public authorities to re-establish real equality between citizens do not escape the classic scrutiny of the Court. Any differences in treatment of persons placed in analogous situations must therefore satisfy the conditions of objectivity, reasonableness, proportionality and legitimacy.

26. The third recital of Protocol No. 12 reads as follows: "Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures".

27. See *Andrle v. the Czech Republic*, no. 6268/08, § 48, 17 February 2011.

28. See *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.

29. See *Stec and Others*, cited above, § 51, ECHR 2006-VI.

30. Ibid., § 52.

31. See *Schwizgebel v. Switzerland*, no. 25762/07, § 85, ECHR 2010 (extracts), and *Solis v. Peru*, Human Rights Committee (HRC), Communication No. 1016/2001, UN Doc. CCPR/C/86/D/1016/2011, § 6.3.

32. See *Farbtuhs v. Latvia*, no. 4672/02, 2 December 2004.

B. Obligation to "level up" in cases of "false" positive discrimination (§§ 22-24)

22. Otherwise, positive discrimination becomes a privilege, which is unacceptable under the Convention. Where there are no factual conditions for treating a particular category of persons more favourably, positive discrimination is no longer justified and the Convention imposes a positive obligation on the State to extend the favourable treatment to those who have hitherto not had the advantage of it. This is what I have already explained in my opinion in the case of *Vallianatos and Others v. Greece*, in which I indicated that "[i]f the national courts were to restrict themselves to declaring the discriminatory provision to be unconstitutional or contrary to the Convention, without being able to extend the special favourable regulation to the individual who was the subject of the discrimination, the breach of the principle of equality would subsist and the judicial protection sought would be devoid of actual content"[33]. That is the fundamental consequence of a finding of a violation of the principle of equality by the Court, as can be seen in its earliest decisions, for example in the case of *Marckx v. Belgium*. In that judgment it indicated, having noted that inheritance law discriminated against children born out of wedlock, that "[it did] not exclude that a judgment finding a breach of the Convention on one of those aspects might render desirable or necessary a reform of the law"[34]. In *Vallianatos* the Grand Chamber also indicated that "[t]he notion of discrimination within the meaning of Article 14 include[ed] cases where a person or group [was] treated, without proper justification, less favourably than another, even though the more favourable treatment [was] not called for by the Convention"[35].

23. A finding of a violation of Article 14 on grounds of difference in treatment of similar groups without objective and reasonable justification can only give rise to one method of redress: levelling "up", namely, an extension of the more favourable treatment to all persons in a similar situation. Levelling "down", that is, removing the preferential treatment from those who had hitherto been eligible for it, is not permissible under the Convention. The advances achieved in human rights protection cannot simply be brushed aside. The Preamble to the Convention itself establishes an objective of maintenance and "further realisation" of human rights and

33. See *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts). In my opinion in *Konstantin Markin*, I had already made the following comment: "Lowering the parental status of servicewomen to the current status of their fellow servicemen would not only unreasonably diminish the degree of social protection afforded to servicewomen, but it would also put all military personnel in an unjustified lesser legal standing in relation to civilians."

34. See *Marckx v. Belgium*, 13 June 1979, § 42, Series A no. 31.

35. See *Vallianatos and Others*, cited above, § 76.

fundamental freedoms. It is clear in this respect that European protection seeks to promote these rights, and prohibits their dilution on a discretionary basis out of political considerations[36]. Moreover, the implementation of a judgment of the Court should not abolish, restrict or limit existing rights in the domestic legal order, as provided for in Article 53 of the Convention. Any other result of interpretation would be manifestly absurd (Article 32 b) of the Vienna Convention on the law of treaties).

24. On that subject, a good example was set by Greece in the case of *Vallianatos*, with the Greek parliament's decision of 23 December 2015 to do away with the unjustified difference in treatment in its legislation and to extend the registered partnership regime to same-sex partners, following the Court's judgment. A bad example was set by the United Kingdom in *Abdulaziz, Cabales and Balkandali*, in which the UK Government provided redress for the violation by granting residence rights to the applicants' spouses, but then levelled "down" by doing away with the possibility of family reunification[37]. That method of implementing the Court's judgment, while respecting the express finding of a violation of equality of treatment, blatantly conflicts with the very spirit of the judgment.

Second Part (§§ 25-49)

IV. Incompatibility of life imprisonment with international law (§§ 25-38)

A. Penological objectives of imprisonment (§§ 25-31)

25. Whilst the acknowledgment that a "whole life" sentence amounts to inhuman treatment[38] undeniably constitutes progress, the Court must take note of the need to simply do away with this archaic form of punishment. The case of *Khamtokhu and Aksenchik* provided it with that opportunity, which the majority have unfortunately refused to seize. If, however, regard had been had to the penological objectives of imprisonment, the international trend in favour of abolishing this type of punishment and the requirement of an evolutive and *pro persona* interpretation of the Convention, this should have led to a different conclusion on the facts of the present case.

---

36. See, on the protection of the minimum obligatory content and the judiciability of fundamental rights, including social rights, my opinion annexed to the case of *Konstantin Markin* (cited above).

37. See *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94.

38. See *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts).

26. In a democratic society a custodial sentence, having regard to the seriousness of such treatment, is only imposed in the most serious cases and must be subject to strict rules. Its purpose is no longer only to punish the convicted offender, but also to fulfil a number of social functions. This is the choice democratic States, which respect human rights, have made in progressing beyond the regressive concept of a purely punitive form of justice. Criminal punishment of culpable offenders of sound mind may have one or more of the following six purposes: 1) positive special prevention (resocialisation of the offender); 2) negative special prevention (incapacitation of the offender, thus avoiding future breaches of the law by the sentenced person by removing him or her from the community); 3) positive general prevention (reinforcement of the breached legal norm by upholding it, and strengthening its social acceptance and compliance with it; 4) negative general prevention (deterrence of would-be offenders from engaging in similar conduct); 5) retribution (atonement for the offender's guilty act); and 6) compensation for the victim[39].

27. Life imprisonment destroys any prospect of social reintegration. It thus excludes outright one of the fundamental purposes of criminal sentencing and retains only retribution and general prevention. Such a conception inherently conflicts with human rights protection. The Court has already made this finding in *Vinter and Others v. the United Kingdom*, in which the judges observed that "while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment"[40]. On that basis the Court concluded that "whole life" imprisonment infringed the requirements of Article 3 of the Convention. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") stated, in one of its recent reports, that "to incarcerate a person for life without any real prospect of release [was], in its view, inhuman"[41]. Accordingly, keeping people in prison until the end of their days, however atrocious their crime has been, undoubtedly constitutes inhuman treatment because it destroys any hope of rehabilitation. Worse still, the message conveyed by this type of punishment is that the prisoner is a dangerous monster, excluded from society forever, who "deserves" to languish in prison for the rest of their days without any further consideration. This type of reasoning is tantamount, from a moral point of view, to denying such people their humanity, as it makes a distinction between prisoners who are "worth" rehabilitating and those who are regarded as a "lost cause".

39. I have already identified these in the cases of *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014, and *Khoroshenko v. Russia*, [GC], no. 41418/04, ECHR 2015.
40. Ibid., §115.
41. CPT, 25th general report, April 2016, CPT/Inf (2015) 10 part, §73.

28. The argument that life imprisonment as applied in Europe today offers the prospect of early release on parole actually swings the balance further in favour of abolition. What point can there be in maintaining a form of punishment which is not actually applied but systematically transformed into a classic prison sentence of variable length? On the contrary, definitively abolishing this punishment would provide everyone with the guarantee that the prospect of imprisonment for life is impossible and that the objective of social reintegration is within reach of all prisoners. Furthermore, it would ensure the effectiveness of procedures for an individualised approach to sentencing and for regular reviews of sentences, which, while they are sometimes complicated to implement, are nonetheless absolutely necessary to ensure respect for everyone's fundamental rights.

29. Even from a strictly pragmatic point of view, life imprisonment does not bring any gains in terms of effectiveness of the criminal punishment. I have already pointed out that no correlation can be shown between the existence of life imprisonment and a drop in number of the most serious crimes. On the contrary, some States which have kept life imprisonment in their criminal arsenal, like the United States or Russia, have high crime rates. Certain States which have abolished it, on the other hand, such as Portugal – since the prison reform of 1884[42] – do not have particularly high rates of general or violent crime[43]. Thus, the final argument in favour of life imprisonment, which consists in identifying advantages in terms of general prevention, does not justify maintaining this type of inhuman treatment in our day and age. Accordingly, there is no justification for life imprisonment in terms of penological objectives of criminal imprisonment or in terms of effectiveness of prevention. The Court should have taken note of that finding and adopted an appropriate interpretation of the Convention as a result.

30. Additionally, and even though the determination of sentence is in principle a matter for the national authorities, the Court has firmly established in its case-law that this discretion is not unlimited. It held in the case of *Nikolova and Velichkova v. Bulgaria* that "[i]t is true that it is not for the Court to rule on the degree of individual guilt, or to determine the appropriate sentence of an offender, those being matters falling within the exclusive jurisdiction of the national criminal courts. However, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights

42. See Ines Pinto, *Punishment in Portuguese Criminal Law: A Penal System without Life Imprisonment*, in van Zyl Smit and Appleton (eds), *Life Imprisonment and Human Rights*, Oxford, 2016, p. 291.

43. See Council of Europe Annual Penal Statistics, SPACE I – prison populations, doc. PC-CP (2015)7, 23 December 2015.

of those under its jurisdiction is adequately discharged"[44]. The Court is therefore required to carry out a proper review in this area.

31. Questions that are this fundamental for the physical and moral integrity of human beings, at the heart of the very core of European human rights protection, cannot be left to the discretion of each State, otherwise the efforts made to guarantee concrete and effective protection of human rights in Europe would be reduced to nought. Allowing a margin of appreciation regarding the appropriate length of prison sentences for criminal offences is unacceptable, having regard to the absolute nature of the right in question, namely, prohibition of inhuman treatment by the State. I therefore fail to understand how the majority can argue in paragraph 81 of the judgment that the provision for life imprisonment in Russian law is compatible with Article 3 of the Convention, against the background of the Russian State's margin of appreciation[45]. This condescension actually seems particularly inappropriate for the Russian Federation, in respect of which the Court has repeatedly found a general problem of inhuman and degrading conditions of detention.

B. Requirement of an evolutive and *pro persona* interpretation of the rights guaranteed by the Convention (§§ 32-38)

32. Besides the fact that life imprisonment is not one of the purposes of criminal punishment, it is tending to be removed from national criminal systems, which illustrates the emergence of an international trend in favour of abolition of this type of punishment. In Europe, in addition to Portugal, Andorra (Articles 35 and 58 of the Criminal Code), Bosnia-Herzegovina (Article 42 of the Criminal Code), Croatia (Articles 44 and 51 of the Criminal Code), Montenegro (Article 33 of the Criminal Code), San-Marino (Article 81 of the Criminal Code), and Serbia (Article 45 of the Criminal Code) do not impose life imprisonment[46]. Beyond European borders, other States proceed in the same way, such as Angola (Article 66 of the Constitution), Brazil (Article 5, XVVII, of the Constitution), Bolivia (Article 27 of the Criminal Code), Cape Verde (Article 32 of the Constitution), China (Article 41 of the Criminal Code of the autonomous region of Macao), Colombia (Article 34 of the Constitution), Costa Rica (Article 51 of the Criminal Code), the Dominican Republic (Article 7 of the Criminal Code), East Timor (Article 32 of the Constitution), Ecuador (Articles 51 and 53 of the Criminal Code), El Salvador (Article 45 of the

44. See *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 61, 20 December 2007.

45. Article 3 is also cited in paragraph 71 and the broad margin of appreciation in paragraphs 85 and 87 of the judgment.

46. Paragraph 19 of the judgment includes Spain and Norway among these countries, forgetting that in those two States it is possible to extend indefinitely the sentence applied to convicted offenders.

Criminal Code), Guatemala (Article 44 of the Criminal Code), Honduras (Article 39 of the Criminal Code), Mexico (Article 25 of the Federal Criminal Code), Mozambique (Article 61 of the Constitution), Nicaragua (Article 52 of the Criminal Code), Panama (Article 52 of the Criminal Code), Paraguay (Article 38 of the Criminal Code), São Tomé and Príncipe (Article 37 of the Constitution), Uruguay (Article 68 of the Criminal Code) and Venezuela (Article 44 (3) of the Constitution). None of those systems has collapsed or experienced a marked increase in crime, showing *de facto* the existence of a move towards abolition and that this type of punishment is unnecessary in a democratic society. The Court is itself aware of this trend, moreover, as it indicated, *inter alia*, in the case of *Vinter*: "there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"[47]. The judges were also at pains to point out that "[t]his commitment to both the rehabilitation of life sentence prisoners and to the prospect of their eventual release is further reflected in the practice of the Contracting States"[48].

33. One of the cardinal principles of interpretation of the 1950 text of the Convention is that of an evolutive interpretation of the rights guaranteed therein. Since the judgment in *Tyrer v. the United Kingdom*, the Court has constantly reaffirmed the leitmotiv of "the Convention as a living instrument", whose interpretation has to take account of evolving norms of national and international law[49]. In that case the Attorney-General for the Isle of Man argued that "having due regard to the local circumstances in the Island" ... the continued use of judicial corporal punishment on a limited scale was justified as a deterrent. However, the Court found that "in the great majority of the member States of the Council of Europe, judicial corporal punishment [was] not, it appear[ed], used and, indeed, in some of them, ha[d] never existed in modern times ... If nothing else this cas[t] doubt on whether the availability of this penalty [was] a requirement for the maintenance of law and order in a European country". It concluded that the Isle of Man must be regarded as sharing fully that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention referred, and that consequently there were no local requirements affecting the application of Article 3. Accordingly, the evolutive interpretation of the Convention is closely linked to the need for a consensual reading of the text based on consideration of the practice of the "great majority" of the Contracting States, which is regarded as an indicator

47. See *Vinter and others*, cited above, §114.
48. Ibid., § 117.
49. See *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

par excellence of "present-day conditions", the evolution of which since the Convention was drafted justifies such an interpretation.[50]

34. Such a consensual and evolutive interpretation conforms to the rules of interpretation of international law. In the *Russian indemnity* case the Permanent Court of Arbitration observed that "the fulfilment of obligations [was], between States as between individuals, the surest commentary on the meaning of these obligations"[51]. The subsequent practice of the parties in executing a treaty is therefore a fundamental tool of interpretation, capable of enlightening the interpreter as to the manner in which the agreement must be understood. It is therefore logical that it should appear among the rules of interpretation listed in Article 31 of the Vienna Convention. This is a classic interpretation technique of international law, practised by nearly all international jurisdictions[52]. The International Court of Justice has for a long time examined such subsequent practice when interpreting the provisions of a treaty[53] and clearly indicated in a case brought by Costa Rica against Nicaragua concerning a dispute regarding navigational and related rights that "the subsequent practice of the parties, within the meaning of Article 31 (3) *(b)* of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties"[54]. In its classic sense subsequent practice is thus understood from a State-centred perspective, as had already been observed by Sir Gerald Fitzmaurice who said that such a practice was not, in his view, made out unless "it [was] possible and reasonable in the circumstances to infer from the behavior of the parties that they ha[d] regarded the interpretation of the instrument in question as the legally correct one, and ha[d] tacitly recognized that, in

50. See my opinion in the case of *Muršić v. Croatia* ([GC], no. 7334/13, 20 October 2016).
51. Russian indemnity case (*Russia v. Turkey*), arbitration award of 11 November 1912, R.S.A., vol. XI, p. 433.
52. See, for example, Court of Justice of the European Communities, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Case C-432/92, 5 July 1994, Reports 1994 I-03087, § 42; Appellate Body of the DSB of the WTO, Japan – Taxes on alcoholic beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of 4 October 1996, Section E; IACHR, *Claude Reyes et al. v. Chili*, judgment of 19 September 2006 (Merits, Reparations and Costs), Series C No. 151, §78; HRC, General Comment No. 22 (Article 18), 27 September 1993, CCPD/C/21/Rev.1/Add.4, §11.
53. See, for example, I.C.J., *Kasikili/Sedudu Island (Botswana/Namibia)*, judgment of 13 December 1999, Reports 1999, § 50; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, judgment of 3 February 1994, Reports 1994, §§66-71; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, jurisdiction and admissibility, judgment of 26 November 1984, Reports 1984, §§ 36-47; *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, Reports 1962, pp. 160-61.
54. I.C.J., *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)*, judgment, I.C.J. Reports 2009, § 64.

consequence, certain behaviour was legally incumbent upon them"[55]. The fact remains that the argument based on the existence of a European consensus is in line with this traditional rule, whose central position in the European system is confirmed by the wording of the Preamble referred to above. In the *Loizidou v. Turkey* judgment the Court reiterated its attachment to respect for the rules of interpretation formulated in the Vienna Convention of 1969, and more particularly the "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[56]. It thus formally expressed the link between subsequent practice and the consensus observable between the Contracting States in considering that "with regard to subsequent treaty practice, while there have been statements opposing the Turkish interpretation of Articles 25 and 46, it has not been established that there is a practice reflecting an agreement among all Contracting Parties concerning the attachment of conditions to these instruments of acceptance"[57]. This approach contains, in essence, an important evolutive dimension in that the practice of States and non-State actors evolves throughout execution of the treaty, adapting to changing customs and new social realities. It is therefore an indication *par excellence* for the European Court of present-day conditions.

35. Beyond a strictly State-centred conception of consensus, however, the very nature of the Council of Europe legal order allows the Court to broaden this concept considerably. The Council embodies in this context a vision of a deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and is thus entitled to impose its will on other Parties[58]. It is no longer a question of having regard only to unanimous manifestations of the wishes of the Contracting Parties to the Convention, but to a plethora of indicators emanating from a plurality of actors. It is no longer a *Lotus*-type[59], State-centred, narrowly bilateral, exclusively voluntaristic, top-down mechanism, but a democratic-type, individual-centred, broadly multi-lateral, purposefully consensual, bottom-up norm creation mechanism which involves European States and other European and non-European non-State actors. From this "deformalisation" of sources of European law derive, *inter alia*, the fundamental role of soft law[60] in the Council of Europe normative system, but also the special

55. Separate opinion of Judge Gerald Fitzmaurice, ICJ, *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, Reports 1962, p. 201.
56. See *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 73, Series A no. 310.
57. Ibid., § 67.
58. See, in particular, paragraphs 20 to 22 of my opinion in *Muršić*, cited above.
59. 1927 PCIJ Series A No. 10, p. 18: "The rules of law binding upon States therefore emanate from their own free will".
60. See on this subject my opinion in *Muršić*, cited above.

characteristics of the contents of a consensus capable of guiding the Court in its interpretation of the Convention.

36. The Court is thus empowered to adopt a relatively broad and flexible conception of the content of a European consensus. It has on certain occasions been satisfied with emerging trends or a consensus that is in the process of materialising to begin an evolutive interpretation of the Convention. In the case of *Christine Goodwin v. the United Kingdom* for example, whilst it noted "the lack of a common European approach"[61] as to how to address the repercussions which the legal recognition of a change of sex might entail, it stated that it "attache[d] ... less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals"[62]. Lastly, the Court has forcefully acknowledged the necessity of that interpretation of the Convention. It observed, *inter alia*, when giving judgment in the case of *Stafford v. the United Kingdom* that "it [was] of crucial importance that the Convention [was] interpreted and applied in a manner which render[ed] its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement"[63].

37. A further cardinal principle of interpretation, closely linked to an evolutive and consensual interpretation, and whose application should have been envisaged by the Grand Chamber, is that of a *pro persona* interpretation of the rights guaranteed. The Statute of the Council of Europe establishes among its objectives the achievement of "a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress". This aim is to be pursued by "agreements and common action" in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and "the maintenance and further realisation of human rights and fundamental freedoms". In thus proclaiming the primacy of human rights among the Council of Europe's objectives, the Statute opens the way for the *pro persona* principle, placing the individual at the centre of its concerns. That conception of European texts results in giving precedence to an interpretation that is most favourable

61. See *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

62. Ibid.

63. See *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002 IV; see also *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 104, 17 September 2009.

to the individual and to his or her rights, in conformity with the principle of effectiveness of the protected rights[64].

38. However, by focusing only on the retributive and deterrent aspects of criminal penalties and failing to adopt an individualised and progressive approach to sentencing, the Court moves towards a strictly *pro auctoritas* view of imprisonment in the present case. Ultimately, the Grand Chamber should have pursued the development set in motion in the case of *Vinter*, in which it acknowledged that "whole life" sentences were incompatible with Article 3 of the Convention, and extended its reasoning to the very principle of life imprisonment. Such an interpretation of Article 3, in keeping with the international trend in favour of abolition of this type of punishment, would have fully squared with the principles of an evolutive and *pro persona* interpretation of the Convention. The example of the abolition of the death penalty, endorsed both by the adoption of Protocols Nos. 6 and 13 and by the case-law[65], is a good illustration of the fact that punishments which used to be regarded as normal can, in time and as European societies progress, become intolerable.

V. Application of Convention standards to the present case (§§ 39-49)

A. Inconsistency of the less favourable treatment of the majority group of men aged between 18 and 65 (§§ 39-46)

39. In refusing to consider that the applicants have suffered discrimination on account of having received life sentences, the majority made an erroneous analysis of the facts of the case. The Court was not being asked to assess the legitimacy of the protection of women, juveniles and old people here, but to review the compatibility with the Convention of treatment inflicted on men aged between 18 and 65.

40. The justification advanced by the Government in support of the difference in treatment between men and women regarding life imprisonment was based, in their own words, on the latter's "special role in society which related, above all, to their reproductive function"[66]. That kind of argument, approved by the majority as "a public interest underlying the exemption of female offenders"[67], is precisely the sort of gender-based social stereotype and paternalistic attitude already criticised in the case of *Konstantin Markin*. However, whilst the justification advanced by the respondent State was the same, the Court does an about-turn in the present

64. See my opinion in *Muršić*, cited above, § 21.
65. See, for example, ECHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 119 et seq., ECHR 2010.
66. See paragraph 47 of the judgment.
67. See paragraph 82 of the judgment.

case and accepts that argument, without further explanation. In sum, the factual inequality which the "positive measures" implemented by the Government purportedly aim to correct is merely the reflection of an over-simplistic and outdated image of women in Russian society.

41. Thus, the reference by the Government to the promotion of "positive inequality"[68] is irrelevant and incompatible with the meaning given to the concept of positive discrimination in international law, as the criminal measure adopted in the relevant provision of the Russian Criminal Code for the benefit of women is not a temporary measure seeking to create equality of opportunity or treatment, but is based on a sexist social prejudice of the legislature[69]. In other words, the binding provisions of Article 4 of the CEDAW do not apply to the present case. Furthermore, the Government's argument is not in any way supported by the various soft law instruments referred to. Those instruments are aimed at conditions of detention and the protection of women's reproductive and child-caring role and must be distinguished from measures of wider scope, such as that provided for in Russian criminal law seeking to protect women in general on account of their sex. It should also be borne in mind that the alternative to life imprisonment under the Russian Criminal Code is a twenty-five-year prison sentence. If a convicted offender is sentenced to twenty-five years' imprisonment, he or she can only apply for release on parole sixteen years later. The gender-based exemption from life imprisonment provided for in Article 57 of the Russian Criminal Code does not in itself achieve the declared aim of protecting pregnant women and mothers of young children, because by the time they can apply for release on parole their children will already have become adults. While not claiming that motherhood should not benefit from specific protection in contemporary societies, the stereotyped message being conveyed here is that women do not have the same power of endurance as men. It cannot therefore constitute a legitimate ground justifying a difference in treatment.

42. The Court reiterates, however, the principles it usually applies when examining cases of gender-based difference in treatment. It clearly states that these "require particularly serious reasons" and that "references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation"[70]. Consequently, the

68. See paragraph 46 of the judgment.

69. See, in this connection, *Karlheinz Schmidt v. Germany*, 18 July 1994, § 28, Series A no. 291-B, and *Emel Boyraz v. Turkey*, no. 61960/08, § 52, 2 December 2014; Court of Justice of the European Union, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, case C-222/84, §§ 44-46, and CEDAW Communication No. 60/2013, CEDAW W/C/63/D/60/2013, 25 February 2016).

70. See paragraph 78 of the judgment.

conclusion set out in paragraph 82 of the judgment, according to which the low number of female prisoners and the need to protect pregnant women and mothers constitute sufficient justification for exempting that group from life imprisonment, blatantly conflicts with the aforementioned principles.

43. The same is true of the difference in treatment of old people. There is no justification for more favourable treatment of this group in international law with regard to determination of sentence, as I have pointed out above. The judgment itself does not provide any legal basis for that distinction. The Government confine their submissions to arguing that the imposition of a life sentence on persons aged over 65 would render eligibility for release on parole an illusory possibility[71]. This is the argument upheld by the majority in the present judgment[72], without it being possible to decipher the reasons for determining the age beyond which life imprisonment becomes intolerable for reasons of humanity and justice. On the contrary, as a man's average life expectancy at birth in Russia is 64.7 years[73] and having regard to the appalling conditions in Russian prisons[74], which must reduce the inmates' life expectancy still further, the legislature can be criticised for arbitrarily fixing the age-limit for this type of penalty at 65 as compared with other prisoners because whether one receives a life sentence at the age of 50 or 65 this has the almost identical effect of rendering eligibility for release on parole an illusory possibility. Moreover, it is difficult to draw a distinction between a person sentenced to imprisonment at the age of 50 who would be unable to apply for release on parole until the age of 75 and another person sentenced to fifteen years' imprisonment at the age of 64, with the possibility of applying for release on parole after ten years. Neither prisoner could apply for release on parole unless they outlived the average Russian male. Accordingly, justification for the differential treatment cannot be regarded as objective, reasonable and legitimate.

44. Besides that, in my view the statistical data provided by the Government to illustrate this state of affairs appear incomplete and insufficient to prove that the difference in treatment between men and women is warranted, thus reinforcing the impression of inconsistency that pervades this judgment. The Court asked the Government to produce the following statistical data: the number of male and female offenders currently serving their prison sentence in Russia; the number of male prisoners sentenced to life imprisonment; and the number of convictions for

71. See paragraph 44 of the judgment.
72. See paragraph 81 of the judgment.
73. According to the most recent statistics of the World Health Organisation. Life expectancy for a 60-year-old man is 76.3 years.
74. See the leading judgment on this subject in *Ananyev and Others v. Russia* (nos. 42525/07 and 60800/08, 10 January 2012), and, specifically regarding conditions of detention after conviction, *Butko v. Russia* (no. 32036/10, 12 November 2015).

women, juveniles or old people in respect of whom Article 57 § 2 of the Criminal Code has been applied. The Government did not produce the data requested, however, and did not explain why they had failed to do so. Instead, they submitted a breakdown of final criminal convictions in 2014 and for the first six months of 2015 per sex, age and category of offence. Nor did they submit any scientific study which would have proved their theory that mitigated responsibility should be ascribed to anyone aged over 65[75]. Moreover, no scientific justification has been provided for fixing the age-limit at 65, nor any correlation established with the retirement age in Russia, which is set at 60 years for men. The failure to provide any statistical evidence clearly detracts from the credibility of the Government's generalisations relating to sex and to age.

45. However, the international instruments of soft law listed above show that there is an international trend towards abolition of life imprisonment for juvenile offenders. I have previously had the opportunity to explain – in my opinion annexed to the case of *Muršić v. Croatia* – the legal value of soft law in international law and *a fortiori* in the European system. I stressed, in particular, that "there is no water-tight, binary distinction between hard law and non-law, since European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classical, formal features of hard international law". It cannot but be observed that the above-cited Resolutions and General Comments calling on States to abolish the imposition of this punishment on children and persons below the age of 18, together with the standard explicitly formulated in the Convention on the Rights of the Child, must be considered as having normative value. Accordingly, there is a legal basis justifying the difference in treatment in favour of juveniles. Nonetheless, that does not close the debate, as we shall see below.

46. Lastly, the argument that calling the difference in treatment into question would lead to a levelling "down" of the protection of fundamental rights is quite simply inoperative. That is what the Government imply when they say that the applicants "sought ... a change in the Russian criminal law which would allow others, including women, young offenders and offenders aged 65 or over, to be given harsher sentences, while the applicants' personal situation would remain the same"[76]. Behind that argument lies the fear of a weakening of the protection of vulnerable groups. Calling Article 57 § 2 of the Russian Criminal Code into question could not generate such a result, however, given the Convention obligation to repair the violation by levelling "up". That is a fundamental guideline underlying the aforementioned evolutive and *pro persona* principles of interpretation of the Convention. Ultimately, this type of argument merely serves to conceal the

75. See paragraph 47 of the judgment.
76. See paragraph 42 of the judgment.

real problem in the present case, which is not so much the refusal to sentence women, juveniles and old people to life imprisonment, but rather agreeing to impose that sentence on men aged between 18 and 65. The finding of a violation of Article 14 taken together with Article 5 in the present case could not have resulted in the abolition of the regime protecting those groups, but should have resulted in allowing men aged between 18 and 65 to benefit from the same protection.

B. Incompatibility with the Convention of the provision in the Russian Criminal Code maintaining life imprisonment (§§ 47-49)

47. The second source of my disagreement with the majority in the present case is the acceptance of the very principle of life imprisonment for men aged between 18 and 65. The Government themselves, in seeking to justify exempting women, juveniles and old people from this type of punishment, rely on the "principles of justice and humanity"[77]. The national authorities were therefore clearly already aware of the inhumanity of such treatment. Accordingly, maintaining it for the majority group (here, male offenders aged between 18 and 65) is tantamount to considering it possible to inflict treatment that conflicts with the principles of justice and humanity on the largest section of the population concerned. Ultimately, whether it be a majority or a minority group is of little importance. It is not possible, if the European system of human rights protection and international law are to be respected, to protect part of the citizens from ill-treatment while continuing to inflict it on the others. Humane considerations cannot benefit only particularly vulnerable groups. Dignity is a quality inherent to the human being that does not depend on age, the crime committed or – still less – gender, in democratic societies.

48. Likewise, it cannot be argued, as the Government do, that the very "harsh conditions" of life imprisonment "would undermine the penological objective of th[e] rehabilitation" of female offenders, young offenders and offenders aged 65 or over[78]. That line of argument amounts to implicit acknowledgment of the fact that life imprisonment of male offenders aged between 18 and 65 does not really pursue the aim of rehabilitation of the offenders, but rather blind punishment and permanent social exclusion, exactly as dictated by a strictly punitive criminal policy. The Government's argument is particularly unfortunate in that it fails to take account of the fact that it is the domestic authorities which have ultimate responsibility for establishing a decent and humane environment in prisons and that this obligation extends to all prisoners, without distinction

77. See paragraph 44 of the judgment.
78. See paragraph 48 of the judgment.

on grounds of age, sex or other personal characteristics[79]. Even if a far higher number of offences are committed by men than by women, the Government cannot rely on that factor to justify an inhumane criminal policy towards male offenders aged between 18 and 65. Otherwise, male life prisoners aged between 18 and 65 would be the scapegoats of male offenders, serving a particularly inhuman sentence in order to atone for allegedly collective guilt on the part of male offenders. It would be inappropriate for the Court to find that female offenders should be protected from inhuman and degrading treatment, but not their male counterparts. Unfortunately, the majority fail to distance themselves from this criminal policy and thus condone it.

49. Furthermore the only legal argument advanced by the majority in refusing to pursue the development set in motion in the case of *Vinter* is the alleged "little common ground between the domestic legal systems of the Contracting States in this area"[80]. I have specifically pointed out above that there is an international trend towards abolishing this type of treatment and that, furthermore, the Court is not bound to wait for that trend to mature to take note of it. On the contrary, it can, and must, accompany and encourage it in the light of an evolutive and *pro persona* interpretation of the Convention. A wait-and-see position does not correspond to the role and vocation of the Court.

VI. Conclusion (§ 50)

50. European and international criminal policies have now attained a sufficient degree of maturity to pass a decisive milestone and abolish life imprisonment. The applicants' arguments in the present case should have been heard, in so far as the Russian legislation is the source of discrimination which highlights the need to simply abolish this punishment, and, over and beyond this case, accompany a more general trend of European human rights law, in conformity with the development of democratic societies and with the aim of developing human rights. Like the death penalty, European States can and must do without this archaic and inhuman punishment, and choose solutions geared towards the social reinsertion of offenders. The role of the Court is to accompany and encourage this change, in the light of an evolutive and *pro persona* interpretation of the Convention. Whilst the subsidiary position of the Court requires it to respect the specific criminal policies of each national system, such fundamental questions do not allow it to remain passive. Its credibility and authority, and above all the effectiveness of the rights guaranteed by the Convention, are at stake.

79. See *Mamedova v. Russia*, no. 7064/05, § 73, 1 June 2006.
80. See paragraph 83 of the judgment.