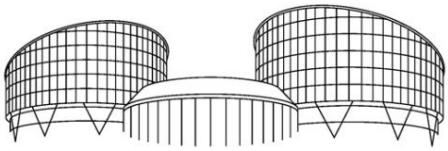

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

BIG ROOM

CASE OF KHAMTOKHU AND AKSENCHIK v. RUSSIA

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

STOP

STRASBOURG

January 24, 2017

This judgment is final. It may undergo shape adjustments.

In the case of Khamtokhu and Aksenchik v. Russia,

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

Guido Raimondi, *president,*
András Sajó,
Iÿÿl Karakaÿ,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nussberger,
Khanlar Hajiyev,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
André Potocki,
Ksenija Turkoviÿ,
Dmitry Dedov,
Branko Lubarda,
Martin Mits,
Stéphanie Mourou-Vikström,
Gabriele Kucsko-Stadlmayer, *judges,*
and Roderick Liddell, *clerk,*

After having deliberated in private on April 20 and October 17, 2016,

Renders the following judgment, adopted on the latter date:

PROCEDURE

1. The case originated in two applications (nos. 60367/08 and 961/11) against the Russian Federation, including two nationals of that State, MM. Aslan Bachmizovich Khamtokhu and Artyom Aleksandrovich Aksenchik (“the applicants”), applied to the Court on 22 October 2008 and 11 February 2011 respectively under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Agreement”).

2. The applicants were represented by N. Yermolayeva, A. Maralyan, E. Davidyan and K. Moskalenko, lawyers in Moscow. The Russian Government (“the Government”) was represented by MG Matyushkin, Representative of the Russian Federation to the European Court of Human Rights.

3. The applicants, sentenced to life imprisonment, complained of having been subjected to discriminatory treatment compared to others

categories of convicted persons for whom the law excludes life imprisonment.

4. The applications were assigned to the first section of the Court (Article 52 § 1 of the Rules of Court – “the Rules”). On September 27, 2011, a chamber of the said section decided to communicate the complaint set out above to the respondent government and to declare the remainder of the applications inadmissible. On May 13, 2014, this chamber composed of Isabelle Berro-Lefèvre, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turkoviÿ and Dmitry Dedov, judges, as well as Søren Nielsen, section registrar, decided to join the applications (Article 42 § 1 of the Rules) and to declare them partially admissible. On December 1 , 2015, a chamber of the former first section composed of András Sajó, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos, Erik Møse, Ksenija Turkoviÿ and Dmitry Dedov, judges, as well as André Wampach, deputy registrar of section, relinquished jurisdiction in favor of the Grand Chamber, none of the parties having objected (Articles 30 of the Convention and 72 of the Rules).

5. The composition of the Grand Chamber was decided in accordance with Articles 26 §§ 4 and 5 of the Convention and 24 of the Rules of Procedure. During the final deliberations, André Potocki, substitute judge, replaced Julia Laffranque, who was unable to attend (article 24 § 3 of the rules).

6. Both the applicants and the Government filed additional written observations on the merits (Rule 59 § 1). Observations were also received from Equal Rights Trust, a non-governmental organization based in London (United Kingdom), which the President had authorized to intervene in the proceedings (Articles 36 § 2 of the Convention and 44 § 3 of the Rules).

7. A hearing took place in public at the Human Rights Palace man, in Strasbourg, April 20, 2016 (article 59 § 3 of the regulations).

Appeared:

– for the Government

MG MATYUSHKIN, Representative of the Russian Federation
before the European Court of Human Rights,
Mme O. OCHERETYANAYA, *advisor ;*

– for the applicants

Mmes A. MARALYAN,
N. YERMOLAYEVA,
E. Davidyan, *advice ;*
K. Moskalenko, *advisor.*

The Court heard Ms. Maralyan, Ms. Yermolayeva and Ms. Davidyan as well as Mr. Matyushkin in their statements and their responses to questions from the judges.

ACTUALLY

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants, MM. Khamtokhu and Aksenchik, were born in 1970 and 1985 respectively. They are currently serving life sentences in the Yamalo-Nenetsia region (Russia).

A. The criminal proceedings against the first applicant

9. On 14 December 2000 the Supreme Court of the Republic of Adygea found the first applicant guilty of various offenses, including escape, attempted murder of police officers and civil servants and illegal carrying of weapons shot, and sentenced him to life imprisonment.

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

11. On March 26, 2008, the Presidium of the Supreme Court of the Russian Federation annulled the appeal judgment of October 19, 2001 in a review procedure and sent the case back for further consideration.

12. On 30 June 2008 the Supreme Court of the Russian Federation upheld the first applicant's conviction. She reclassified some of the charges against him but did not change the sentence of life imprisonment.

B. The criminal proceedings against the second applicant

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

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

II. RELEVANT DOMESTIC LAW

A. Criminal law

15. According to the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR), capital punishment could not be imposed on a person under the age of 18 or on a woman who was pregnant either at the time of the commission of the offense is at the time of judgment (article 23). The alternative to capital punishment was a prison sentence of fifteen years. Life imprisonment was not planned.

On April 29, 1993, the Criminal Code of the RSFSR was amended and the exclusion of the death penalty provided for in Article 23 of the Criminal Code was extended to all women as well as juvenile offenders and offenders aged 65 or more.

The Criminal Code of the Russian Federation, which replaced the Criminal Code of the RSFSR on January 1 , 1997, provides for a more extensive range of punishments, including a maximum of twenty years of imprisonment (Article 56), life imprisonment (article 57) and capital punishment (article 59). Women as well as offenders under 18 years of age and 65 years of age or over are excluded in identical terms from both life imprisonment and the death penalty (articles 57 § 2 and 59 § 2). By means of pardon, the death penalty can be commuted to life imprisonment or to a sentence of twenty-five years of 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 *AL (XW) v. Russia,* no. 44095/14, § 51, October 29, 2015).

16. Article 57 of the Penal Code (entitled “Life imprisonment”) reads as follows:

> “1. Life imprisonment may be imposed for the commission of offenses particularly serious harm to life or (...) safety.
>
> 2. Life imprisonment may not be imposed on women or men who at the time of the commission of the offense were under 18 years of age or who at the time of pronouncement of the verdict were 65 years of age or over. »

17. A court may grant early release to a prisoner sentenced to life imprisonment who has served at least twenty-five years of his sentence, provided that the person concerned has fully complied with prison rules during the three years. preceding the request for release (article 79 § 5).

B. Case law of the Constitutional Court

18. The Constitutional Court has always declared inadmissible the complaints concerning the alleged incompatibility of Article 57 § 2 of the Penal Code with the constitutional prohibition of discrimination. The most recent judgment in which it reaffirms its established position in this regard dates from February 25, 2016; she formulates the following considerations:

> "The ban on imposing a life sentence or capital punishment on certain categories of offenders cannot be considered as a breach of the principle of equality before the law and the courts (article 19 of the Constitution) or as a violation of Russia's international legal commitments. This ban is justified by the need to take into account the age and social and physiological characteristics of people falling into these categories on the basis of the principles of justice and humanity in criminal matters in order to achieve, in a more complete manner and effective, the objectives of criminal sanctions in a democratic State based on the rule of law. According to the jurisprudence of the Constitutional Court, the ban does not prevent [the courts] from imposing just sanctions on other categories of offenders, depending on the seriousness of the crimes they committed, the circumstances of the commission and the personality of the interested parties; this ban does not infringe their rights and, consequently, is not discriminatory against them (decisions nos. 638-OO of October 21, 2008, 898-
>
> OO of June 23, 2009, 1382-OO of October 19, 2010, 1925-O of October 18, 2012, and 1428-O of September 24, 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 is not provided for: Andorra, Bosnia and Herzegovina, Croatia, Spain, Montenegro , Norway, Portugal, San Marino and Serbia. In the rest of the world, many Latin American countries (Bolivia, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Dominican Republic, El Salvador, Uruguay and Venezuela) have abolished life imprisonment, subject to certain exceptions in times of war.

20. A study comparing the sentencing guidelines in thirty-seven Council of Europe member states in which offenders can be sentenced to life imprisonment shows that all these countries establish a special regime for minors or young adults, whether by the integration of special provisions in the penal code or by the adoption of specific legislation relating to juvenile delinquents. Sentencing offenders under the age of 18 to life imprisonment is prohibited in thirty-two member states; Austria, Liechtenstein, the former Yugoslav Republic of Macedonia and Sweden extend the ban to young people

adults under 21 years of age, and Hungary applies it to those who were not yet 20 years old when the offense was committed.

21. Four Member States (in addition to Russia) apply a specific sentencing regime for elderly offenders: an offender who has reached retirement age (Azerbaijan), the age of 60 (Georgia) or age of 65 (Romania and Ukraine) cannot be sentenced to life imprisonment. Under Romanian law, the maximum penalty in such cases cannot exceed thirty years of imprisonment.

22. As for gender differences, Albania, Azerbaijan and the Republic of Moldova (in addition to Russia) generally exclude in their criminal law the sentencing of women to life imprisonment. In Armenia and Ukraine, criminal law prohibits courts from sentencing women to life imprisonment who were pregnant at the time of the commission of the offense or the passing of the sentence. A similar provision appears in the Bulgarian penal code, which prohibits sentencing pregnant offenders to life imprisonment without the possibility of parole.

IV. RELEVANT INTERNATIONAL INSTRUMENTS

A. Juvenile delinquents

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

> “A death sentence cannot be imposed for crimes committed by persons under the age of 18 and cannot be carried out against pregnant women. »

24. Article 37 (a) of the Convention on the Rights of the Child reads as follows:

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

25. The Committee on the Rights of the Child, in its General Comment n No. 10 of 2007, made the following recommendation:

> “Since the imposition of a life sentence on a child is likely to make it very difficult or even impossible to achieve the goals of juvenile justice, despite the possibility of release, the Committee urges States parties to abolish all forms of life imprisonment for offenses committed by persons under the age of 18. »

26. On December 20, 2012, the United Nations General Assembly adopted Resolution A/RES/67/166 on human rights in the administration of justice, in which it urges States:

> "(...) to ensure that, in their legislation as in their practice, neither the death penalty nor life imprisonment without the possibility of release (...) are inflicted for offenses committed by persons of under 18 years of age, and (...) to consider abolishing other forms of life imprisonment for crimes committed by persons under 18 years of age. »

B. Protection of women and maternity

27. The wording of Article 6 § 5 of the International Covenant on Civil and Political Rights is reproduced in paragraph 23 above.

28. The relevant passage in this case from the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) reads as follows:

Article 4

> "1. The adoption by States Parties of temporary special measures aimed at accelerating the establishment of de facto equality between men and women shall not be considered an act of discrimination as defined in the this Convention, but must in no way result in the maintenance of unequal or distinct standards; these measures must be repealed as soon as the objectives in terms of equality of opportunity and treatment have been achieved.
>
> 2. The adoption by States Parties of special measures, including measures provided for in this Convention, which aim to protect maternity shall not be considered a discriminatory act. »

29. The relevant provisions of the United Nations Rules for the Treatment of Women Prisoners and the Imposition of Non-custodial Measures on Women Offenders (the Bangkok Rules) are as follows:

Preamble

> "Considering that female prisoners constitute one of the vulnerable groups who have necessities and special needs (...) »

Rule 5

> "The premises housing female prisoners must have the facilities and supplies necessary to meet the specific hygiene needs of women, (...) in particular for women who have to cook, pregnant women, nursing mothers or women menstruating. »

Rule 10

> "1. Health services specific to women at least equivalent to those offered outside must be provided to inmates. »

Rule 31

"Clear policies and regulations on the conduct of prison staff aimed at providing female prisoners with maximum protection against any physical or verbal violence or abuse linked to their gender and against any sexual harassment must be developed and implemented. »

Rule 48

"1. Prisoners who are pregnant or breastfeeding must 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, replacing Recommendation o R (87) 3 on the Prison n Rules , which took into account developments in penal policies, sentencing and overall prison management in Europe. The relevant passages of the amended Prison Rules read as follows:

"13. These rules must be applied impartially, without any discrimination based in particular on sex, race, color, language, religion, political opinions or any other opinions, national or social origin, membership of a national minority, property, birth or any other situation.

(...)

34.3 Prisoners must be allowed to give birth outside prison but, if a child is born in the establishment, the authorities must provide the necessary assistance and infrastructure. »

31. In its Resolution of March 13, 2008 on the particular situation of women in prison, the European Parliament recommends:

"14. (...) that the detention of pregnant women and mothers with their young children be considered only as a last resort and that, in this extreme case, they can obtain a more spacious cell , if possible individual, and are given special attention, particularly in matters of diet and hygiene; considers, furthermore, that pregnant women must be able to benefit from prenatal and postnatal monitoring as well as parenting education courses of equivalent quality to those provided outside the prison setting. »

PLACE

ON THE ALLEGED VIOLATION OF ARTICLE 14 OF THE AGREEMENT COMBINED WITH ARTICLE 5

32. The applicants allege that their sentence to life imprisonment exposed them to discriminatory treatment based on sex and

age, in violation of Article 14 of the Convention taken together with Article 5. The relevant passages of these provisions read as follows:

Article 5

"1. Everyone has the right to liberty and security. No one may be deprived of their liberty, except in the following cases and by legal means:

(a) if he is lawfully detained after conviction by a competent court; (...) »

Article 14

"The enjoyment of the rights and freedoms recognized in the (...) Convention must be ensured, without distinction of any kind, based in particular on sex, race, color, language, religion, political opinions or any other opinions, national or social origin, membership of a national minority, property, birth or any other situation. »

A. Theses of the parties

1. The applicants

33. The applicants contend that the different and less favorable treatment which is applied under Article 57 of the Penal Code to the group to which they belong – men aged 18 to 65 as opposed to all women and men under 18 years of age and over 65 years of age – in relation to life sentences constitutes an unjustified difference in treatment, based on sex and age. Without seeking the universal application of life imprisonment to all offenders, including women as well as men aged under 18 and over 65, they believe that if the Russian authorities decided that it was unjust and inhumane to impose life imprisonment on these categories of people, they should also have refrained from providing this sentence for men aged 18 to 65.

34. As for the difference in treatment linked to sex, the applicants argue that the difference in sentencing policies applicable to men and women has no reasonable or objective justification. They consider that this difference reflects an outdated and traditionalist vision of the social role of women and is based neither on scientific or statistical data nor on generally accepted legal principles. They add that the supposedly special role of women in society, which is primarily due to their reproductive function and their responsibility for raising children, does not constitute a sufficient reason to treat female offenders more favorably than male offenders. For them, whatever the biological differences between the two sexes, men and women participate in the protection of their children, as well as in the care and support that should be provided to them. THE

national laws make no distinction between the rights and obligations of a mother and those of a father with regard to the education of children. The Court would have said that stereotypes linked to sex, such as the idea that it is rather women who take care of children, cannot in themselves be considered to constitute sufficient justification for a difference in treatment – the applicants refer to this with regard to the case of *Konstantin Markin v. Russia* ([GC], no. 30078/06, § 143, ECHR 2012 (extracts)). In any case, the difference in treatment in terms of sentencing would not make it possible to achieve the stated aim of protecting maternity, the gap between a thirty-year prison sentence and life imprisonment. hardly making any difference to a woman's reproductive function since, in both cases, she would spend all the years during which she was able to procreate in prison.

35. The applicants consider the Government's argument that women are psychologically more vulnerable than men and are affected to a greater extent by the ordeals of detention to be unfounded. In the absence of any scientific basis to support this generalization, they see it as just another stereotype, that of “male endurance.” They do not deny that detention is a hardship, but they consider that it is one for both men and women, and that there are individuals in both sexes presenting varying degrees of vulnerability.

36. The applicants recognize that the physiological characteristics of women falling into certain categories – and at specific times, for example, during pregnancy, breastfeeding or the period devoted to raising children – can serve as an objective justification and reasonable to a difference in treatment. They indicate, however, that Article 57 of the penal code assumes that there are universal physiological characteristics that differentiate men and women in all respects and at all times. They add that the excessive nature of the differentiation made by the Government between women and men is striking when compared to generally accepted international standards, in which only certain factors specific to women would be taken into consideration. Thus, Article 6 § 5 of the International Covenant on Civil and Political Rights (“the ICCPR”) would prohibit the imposition of the death penalty on a pregnant woman due to considerations relating to the unborn child. Likewise, Article 76 § 3 of the Additional Protocol to the Geneva Conventions of 1949 (relating to the protection of victims of international armed conflicts) aims to prevent the death penalty from being pronounced or carried out in the case of pregnant women or mothers of young children dependent on them.

37. The applicants see no legitimate aim in Article 57 of the Penal Code, which would establish between offenders a permanent and irrevocable distinction based on sex, even if they find themselves in a situation

identical in all other respects. They consider that the fact of including this distinction in the legislation instead of, for example, authorizing the judge, in the exercise of his discretion, to take into account the sex of the offender when pronouncing the sentence does not does not make it possible to achieve a reasonable relationship of proportionality between the means employed and the aim sought. They argue that, while it may be legitimate to take into account certain particular circumstances linked to sex, there is no need for institutionalized discrimination in this regard. Indeed, according to the general principles of sentencing policy in Russian law, courts may take into account these particular circumstances – notably the family situation and the needs and obligations relating to dependent children – when determining whether men than for women the sanction that should be applied.

38. As for the differences in treatment based on age in terms of sentencing, the applicants recognize that certain international standards in the field of human rights prohibit the imposition of the heaviest criminal sanctions against minors (they mention in particular Article 6 § 5 of the ICCPR and Article 37 a) of the Convention on the Rights of the Child). They consider that, among these provisions, only Article 37 (a) of the Convention on the Rights of the Child applies directly in the present case, since it prohibits the imposition of a sentence on minors. life imprisonment without possibility of release. However, they consider that this article is irrelevant in the Russian context, where all prisoners sentenced to life imprisonment, regardless of their age, could benefit from parole after twenty-five years of imprisonment.

39. The applicants accept that age-related differentiation may be necessary if individuals over 65 are considered a socially vulnerable group whose ability to control their conduct and foresee the consequences of their actions is insufficiently developed or weakened. However, no scientific study demonstrates that diminished responsibility should be recognized for all people over 65 years of age. As for the hypothesis consisting in considering all persons over 65 years of age as irresponsible, the applicants indicate that national law authorizes persons over 65 years of age to exercise certain important public functions, in particular that of judge of the Constitutional Court of Russia until the age of 75, which they believe weakens the age-related generalization. They add that since the average life expectancy in Russia is 65 years for men and that the statistics on this subject do not take into account the poor conditions prevailing in penitentiary establishments in Russia, which according to them must still be reduced the life expectancy of prisoners, a life sentence has an almost identical effect for a 40-year-old man and for a man who has reached the age of 65: the chances of

early release under conditions would be illusory for both. The applicants therefore maintain that the age limit of 65 is arbitrary, considering in particular that the retirement age is set at 55 for women and 60 for men.

40. Finally, still on the question of differences linked to age, the applicants admit that minors form a socially and psychologically vulnerable group, which would therefore need special protection measures dictated by considerations of humanity. For them, however, it does not follow that other age categories should be discriminated against and deprived of such protection. As for elderly offenders, the applicants maintain that age can be considered in certain cases as a mitigating circumstance – as provided for in Article 61 § 2 of the Penal Code – and that, according to Article 81 § 2 of the Penal Code , people who contracted a serious illness after committing an offense may be exempted from any sanction.

41. In conclusion, the applicants state that an international trend towards the abolition of life imprisonment is emerging, indicating that some twenty-five countries in the world do not provide for this type of sentence for any category of people. For them, even assuming that life imprisonment could constitute an appropriate form of sanction in certain circumstances, it must not be based on characteristics linked to sex, age or an age group, but it must based solely on the particular circumstances of the offense and the personality of its perpetrator. The applicants consider that a modern sentencing policy should be characterized by a high degree of individualization of sentences and that the general principle in this matter should be individualization of sentencing and not institutionalized discrimination based on age and on sex.

2. The Government

42. The Government maintained that the applicants cannot claim to be victims of a violation of the Convention, their convictions having been “lawful” within the meaning of Article 5 § 1 a). He claims that those involved aspire to a change in Russian criminal law that would allow harsher sentences to be imposed on other people, including women, juvenile offenders or people aged 65 or over, regardless of their personal circumstances. is nevertheless modified. He argues that a finding of a violation of Article 14 would not lead to the obligation to review individual sentences or to completely abolish life imprisonment in Russia.

43. For the Government, an examination of the Court's case law relating to the question of life imprisonment with regard to Article 3 of the Convention demonstrates the compatibility with it of Russian criminal law – which would provide for a right to be released under conditions also for

persons sentenced to such a sentence. Life imprisonment would apply in a majority of states in the world and only six member states of the Council of Europe would have abolished it. In Russia, life imprisonment would be a punishment for the most serious crimes but would always be accompanied by alternative sentences and would never be imposed automatically. The Government considers that Contracting States should be given a margin of appreciation in deciding the appropriate length of prison sentences for given offenses (in this regard it refers to the *László Magyar* case

vs. Hungary, no. 73593/10, § 46, May 20, 2014).

44. Citing the established jurisprudence of the Russian Constitutional Court, the Government maintains that Article 57 of the Criminal Code, when it prohibits the sentencing of women, young people under the age of 18 and persons over the age of 65 to life imprisonment, is inspired by the principles of justice and humanity that sentencing policy should take into account the age and "physiological characteristics" of various categories of offenders. The restrictions concerning these categories of offenders would have no effect on the sentencing of other offenders, for whom the sentences imposed would take into account the nature of the offense in question, the danger it poses to the public, the circumstances in which it was committed and the personality of its author. The Government considers that the case law of the Constitutional Court reflects the requirements of international law relating to a differentiated approach to sanctions depending on the sex and age of the offender. With regard to juvenile delinquents, he mentions 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 Committee, the Resolution of the the United Nations General Assembly of November 9, 20121 and other international instruments, as well as the abolition by a large majority of Member States of life imprisonment for minors. He adds that people aged over 65, in the event of life imprisonment, could only benefit from early release at the age of 90, which, having regard to natural life expectancy, would make this possibility illusory.

45. The Government further indicates that international law enshrines a more humane approach towards women, with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stating in Article 4 § 2 that special measures aimed at protecting maternity should not be considered discriminatory. He refers to certain studies

1. The document to which the Government refers here is a draft resolution submitted to the Third Committee of the United Nations General Assembly, which was subsequently amended (see document A/C.3/67/L. 34 Rev. 1) and finally adopted by the Plenary General Assembly in the form reproduced in paragraph 26 above.

scientists according to which women constitute a minority of people in detention around the world. It would often be women who, before incarceration, would provide for the education of children, and 90% of female prisoners would have a history of domestic violence, which would help to explain their criminal behavior and highlight their vulnerability. Russia would not be the only state that refuses to sentence women to life imprisonment; Albania, Armenia, Azerbaijan, Belarus and Uzbekistan would do the same. The Ukrainian Parliament has reportedly adopted at first reading a bill excluding women from life imprisonment.

46. The Government maintains that Russian law establishes the general rule that a sentence of life imprisonment can be imposed for particularly serious offenses against life and public safety and that the prohibition on sentencing women, minors and Persons aged 65 or over to life imprisonment constitute an exception to this rule. He considers that this exception does not infringe the rights of the majority of convicts but rather reflects an approach more favorable to certain specific groups of individuals in determining sentences. For him, this measure could be described as “positive inequality” designed to compensate, by legal means, for the natural vulnerability of these social groups. The notion of discrimination would only refer to unjustified restrictions. In this sense, the applicants' cases do not reveal any discrimination and their complaints are of an abstract nature since their sentences were fixed according to the seriousness of the offenses committed and did not put them in a disadvantageous position in relation to women, minors or people aged 65 or over.

47. As to the question of whether the difference in treatment is reasonably proportionate to the legitimate aim pursued, the Government considers that the age-related restrictions are necessary. In this regard, he maintains that minors and the elderly constitute socially vulnerable groups whose capacity to understand the implications of their conduct, to control it and to foresee the consequences of their actions is insufficiently developed or weakened. These groups would be prone to impulsive and inconsiderate behavior that could result in criminally reprehensible conduct. As for women, the exception relating to penalties would be justified by their special role in society linked, above all, to their reproductive function. The Russian Constitutional Court has reportedly stated in the past that a different retirement age for men and women could be explained not only by physiological differences between the sexes but also by the special role of motherhood in society, and would not amount to discrimination but would rather serve to reinforce effective rather than formal equality.

48. In short, the Government considers that, having regard to the characteristics, in particular biological, psychological and sociological, of women, minors and men aged 65 or over, the sentence of life imprisonment of them and their detention in very harsh conditions would compromise the penological objective of the amendment of those concerned. He also indicates that the exception actually concerns a small number of convicted people. As of November 1 , 2011, only 1,802 offenders were reportedly sentenced to life imprisonment in Russia. Of a total of 533,024 people in detention, only 42,511 are women.

3. The third party involved

49. The third party intervener, Equal Rights Trust, submits that, with the exception of the provisions relating to juvenile offenders, general rules excluding particular groups from life imprisonment cannot be justified under Article 14. To found his thesis, he refers to international human rights law as well as the law and practice in force at the regional and national levels.

50. The third party intervener considers that the references to “positive discrimination” in the context of the present case are irrelevant and incompatible with the meaning given to this notion in international law. Positive action would be a necessary part of the right to equality and would include a range of measures to overcome past disadvantage. The measures taken should be designed to remedy the disadvantage identified, and the State should be able to demonstrate on what basis it concluded that the measures chosen would achieve this objective. However, the exclusion of all women from a certain category of sentences would not constitute a temporary measure and would not pursue an objective in terms of equal opportunities or treatment. Article 4 § 2 of CEDAW would be a provision of restricted scope aimed at the treatment to be reserved for pregnant women and young mothers, and could not be used to justify a difference in treatment which would be applied to women on the basis of biological differences outside this context or which would be based on the perceived social role of women as mothers. Special measures intended for pregnant women and young mothers should be limited to what is strictly necessary (the third party intervener refers in this regard to the case of *Johnston v Chief Constable of the Royal Ulster Constabulary,* ECJ, case C-222/84, 15 May 1986, §§ 44-46). The courts would always reject arguments based on paternalism and on perceptions that women are more “vulnerable” than men and in need of “protection” (the third party refers, in this regard, to the case of Karlheinz Schmidt v . *Germany,* o 13580/88, July 18, 1994, § 28, series A no. 291-B concerning the exclusion of women from compulsory n service for men on the basis of their

“physical and psychological particularities”, and the *Emel Boyraz* affair *vs. Turkey* (no. 61960/08, § 52, December 2, 2014), concerning recruitment for security guard positions open only to men due to risks and night work).

51. As for offenders aged 65 or over, the third party intervener maintains that discrimination based on age is prohibited by all major international treaties. According to him, the creation of distinctions between people who have or have not yet reached a given age is in itself problematic, and requires a high level of proof and justification. Simple general assertions concerning the suitability of a given measure for achieving a legitimate objective would not suffice *(Age Concern England,* ECJ, case C-388/07, March 5, 2009, § 51). For the third party, even if it has been shown that a life sentence is more often considered excessively harsh in cases involving people over 65 than in cases involving people who have not reached the age of 65. At this age, a general exclusion would not necessarily be a proportionate means of avoiding heavy sentences. Age would not be a binary data, and any difference based on this element involving the setting of a limit would call for a comparative analysis of State practices and scientific evidence for the purpose of examining whether a measure is justified.

52. As for the means of remedying the existing situation, the third party intervener considers that in cases where a State, acting within the framework of its discretionary power, decides that a sentence of life imprisonment is “inhumane” if imposed to certain groups and this decision is considered contrary to Article 14, the principle prohibiting a “race to the bottom” would prevent the State concerned from putting an end to this discrimination by the pure and simple elimination of the most favorable treatment applied to the groups protected. It maintains that, in accordance with general principles of international law and international custom, the implementation of decisions of international courts should not abolish, restrict or limit existing rights (in this regard it refers to Article 53 of the Convention). According to him, once the State has eased restrictions on the right to liberty of a group of people, it cannot justify a step backwards by invoking its obligations under the Convention. The third party intervener believes that, to comply with Article 14, the State should instead adopt an individualized approach in determining sentences taking into account, in particular, the particularities of the offender. In his opinion, an individualized approach would allow for better adjustment of sentences to the specific vulnerabilities of restrictively defined categories of individuals, as opposed to excessively broad, and therefore arbitrary, distinctions based on sex or age.

B. Assessment of the Court

1. Applicability of Article 14 combined with Article 5

a) Whether the facts fall “within the ambit” of Article 5

53. The Court recalls that Article 14 only supplements the other material clauses of the Convention and its Protocols. It has no independent existence, since it only applies to “the enjoyment of the rights and freedoms” that they guarantee. Its application does not necessarily presuppose the violation of any of the material rights guaranteed by the Convention and, to this extent, it has an independent scope. A measure which in itself complies with the requirements of the article establishing the right or freedom in question may, however, infringe that article, taken in conjunction with Article 14, on the grounds that it is discriminatory.
For Article 14 to apply, it is therefore sufficient that the facts of the dispute fall “within the ambit” of at least one of the said clauses *(Clift v. United Kingdom,* no. 7205/07, § 41 , July 13, 2010, *Kafkaris v. Cyprus* [GC], o 21906/04, § 159, ECHR
n 2008; and *Case “relating to certain aspects of the linguistic regime of education in Belgium” (merits),* July 23, 1968, pp . 33-34, § 9, series A no. 6).

54. The Court observes that the applicants do not complain about the severity of the sanction as such or the length of their sentences, nor do they allege a violation of their material right to liberty. They complain of having been deprived of their liberty for the rest of their lives as a result of their conviction and of having been treated, under article 57 of the penal code, less favorably than women or others. men aged under 18 or over 65 convicted of similar or comparable offenses, due to their sex and age. They see it as a violation of Article 14 taken in conjunction with Article 5 of the Convention.

55. Both applicants were deprived of their liberty after being convicted by a competent court, a situation which is explicitly covered by Article 5 § 1 (a) of the Convention. The Court recalls that questions relating to the appropriateness of the sentence generally fall outside the scope of the Convention and that it is not required to say, for example, what duration of detention should be appropriate for such or such offense *(Vinter and Others v. United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, § 105, ECHR 2013 (extracts), *Sawoniuk v. United Kingdom* (dec.), o 63716/00, ECHR 2001-VI, *T. v. United Kingdom* [GC], no. 24724/94, §
n 117, December 16, 1999, and *V. v. United Kingdom* [GC], no. 24888/94, § 118, ECHR 1999-IX; see however, concerning a manifestly disproportionate sanction for ill-treatment, *Nikolova and Velitchkova v. Bulgaria,* no. 7888/03, § 61, 20 December 2007, *Okkalÿ v. Turkey,* o 52067/99, § 73, ECHR 2006-XII (extracts), and *Derman v. Turkey,* o 21789/02, § 28, May 31, 2011).
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n

56. At the same time, the Court also expressed the idea that measures relating to the execution of the sentence or prison benefits may have an impact on the right to liberty guaranteed by Article 5 § 1, since the duration effective deprivation of liberty of a convicted person depends in particular on their application *(Del Río Prada v. Spain* [GC], no. 42750/09, § 127, ECHR 2013, and *Stafford v. United Kingdom* [GC], no o 46295/99, §§ 55-83, ECHR 2002-IV). Likewise, still in the context of the execution of a criminal sentence, in a case relating to the right to parole of a prisoner sentenced to life imprisonment, the Court considered that "if Article 5 § 1 a) of the Convention does not guarantee the right to conditional release, a question may arise in the context of this provision combined with Article 14 of the Convention when a well-established policy on the determination of sentences is likely to affect individual situations in a discriminatory manner" (Gerger *v. Turkey*

[GC], no. 24919/94, § 69, July 8, 1999; see also, to the same effect, *Clift,* cited above, § 42).

57. It should also be noted that in some cases, unlike the situation in the above-mentioned cases but like that examined in the present case, it was the criminal sanction itself – rather than its execution – imposed in application of domestic legal provisions distinguishing between offenders on the basis of age and sex which raised an issue under Article 14 of the Convention taken in conjunction with Article 5 (Nelson v. the United Kingdom, *no .* 11077 /84, Commission decision of 13 October 1986, Decisions and Report 49, p. 175, which concerned allegations of discrimination based on age, and AP v. the United Kingdom, no. 15397/89, *decision* of the Commission of January 8, 1992 (removal), which concerned a difference in sentencing between female and male juvenile delinquents).

58. Article 5 of the Convention does not prohibit the imposition of life imprisonment *(Vinter and Others,* cited above, §§ 104 to 106) when such a sentence is provided for by national law. However, the prohibition of discrimination enshrined in Article 14 goes beyond the enjoyment of the rights and freedoms that the Convention and its Protocols require each State to guarantee. It also applies to additional rights, falling within the general scope of any article of the Convention, which the State has voluntarily decided to protect. This principle is deeply anchored in the Court's jurisprudence *(EB v. France* [GC], no. 43546/02, § 48, 22 January 2008, *Stec and Others v. United Kingdom* (dec.) [GC], nos. 65731 /01 and 65900/01, § 40, ECHR 2005-X, and *Abdulaziz, Cabales and Balkandali v. United Kingdom,* May 28, 1985, § 78, Series A no. 94).

59. Consequently, situations where national legislation excludes certain categories of convicted prisoners from life imprisonment fall within the scope of Article 5 § 1, for the purposes of the applicability of Article 14 taken in conjunction with this provision.

60. Therefore, in so far as the applicants complain of the allegedly discriminatory effect produced by the provisions relating to the fixing of sentences contained in Article 57 of the Penal Code, the Court considers that the facts of the case fall '' under the authority of Article 5 of the Convention.

b) Whether the alleged difference in treatment is linked to one or any other of the grounds set out in Article 14

61. Article 14 does not prohibit any difference in treatment, but only certain distinctions based on an identifiable, objective or personal characteristic ("situation"), by which persons or groups of persons are distinguished from each other. This provision lists specific elements constituting a "situation", such as sex or race. However, the list contained in Article 14 is indicative, and not exhaustive, as evidenced by the adverb "notably" (" *any ground such as* " in the English version) as well as the presence in this list of the expression " *any other status* " in the English version. The expression "any other situation" has generally received a broad interpretation not limited to characteristics which are personal in the sense that they are innate or inherent to the person *(Clift,* cited above, §§ 56-58, *Carson and Others v. 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 submit that Article 57 of the Russian Criminal Code establishes a sentencing policy which, with regard to life imprisonment, differentiates treatment based on sex and age. The Court observes that Article 14 explicitly prohibits any discrimination based on "sex", and that it has already accepted that "age" is a concept also covered by this provision (Schwizgebel *v. Switzerland,* no. 25762/07 , § 85, ECHR 2010 (extracts), and *Nelson,* aforementioned decision).

c) Conclusion

63. Having regard to the above considerations, the Court considers 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 combined with section 5

a) General principles

64. According to the established case-law of the Court, for a problem to arise under this provision, there must be a difference in the treatment of persons placed in similar or comparable situations. Such a difference is discriminatory if it is not based on an objective and reasonable justification, that is to say if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means used. and the intended goal. Contracting States enjoy a certain margin of appreciation in determining whether and to what extent differences between otherwise similar situations justify distinctions in treatment. The notion of discrimination within the meaning of Article 14 also includes cases in which an individual or group is, without adequate justification, treated less favorably than another, even if the Convention does not require more favorable treatment (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. With regard to the burden of proof under Article 14 of the Convention, the Court has already said that, where an applicant has established the existence of a difference in treatment, it is incumbent on the Government to demonstrate that this difference in treatment was justified *(Biao,* cited above, § 92, and *DH and others v. Czech Republic* [GC], o 57325/00, § 177, ECHR 2007-IV).

b) On the question of whether the applicants were in a situation similar or comparable to that of other offenders

66. The Court must first determine whether in the present case there was a difference in treatment between persons placed in similar or comparable situations.

67. The applicants' complaint relates to the setting of sentences applicable to offenders who have been convicted of particularly serious crimes punishable by life imprisonment. The applicants were sentenced to life imprisonment, whereas women, minors or people aged 65 or over convicted of the same or comparable offenses would not have received this sentence due to the explicit legal prohibition contained in Article 57 § 2 of the Russian Criminal Code (paragraph 16 above).

68. It follows that the applicants were in a situation similar to all other offenders convicted of the same or comparable offenses. By comparison, the *Gerger* case illustrates a different type of situation: in this case, in

that persons convicted of terrorist acts were not entitled to conditional release before having served three-quarters of their sentence, unlike prisoners convicted of common law offenses, the Court declared that "the disputed distinction does not apply to different groups of people but to different types of offenses, depending on the seriousness recognized by the legislator" (Gerger, cited above, § 69; see also, to the same effect, the *Kafkaris* case , cited above, § 165, in which the Court concluded that a prisoner sentenced to life imprisonment was not in a situation analogous or comparable to that of other prisoners who were not serving such a sentence).

c) The question of whether the difference in treatment was justified

69. The present case concerns a sentencing policy excluding women, minors and persons aged 65 or over from life imprisonment. It is undeniable that this exclusion amounts to a difference in treatment based on sex and age. The Court must examine whether this difference in treatment pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means used and the aim sought. In doing so, it must have regard to the margin of appreciation enjoyed by the respondent State in this matter.

70. The Government maintains that the disputed difference in treatment was intended to promote principles of justice and humanity requiring that sentencing policy take into account the age and “physiological characteristics” of various categories of offenders (paragraph 44 above). The Court considers that this aim can be considered legitimate for the purposes of sentencing and the application of Article 14 taken in conjunction with Article 5 § 1.

71. As for the proportionality of the means used, it should first be remembered that the present case concerns a specific type of sentence: life imprisonment. Unlike various non-custodial or fixed-term sentences, life imprisonment is reserved, in the Russian penal code, for a few particularly serious offenses for which the trial court, after taking into account all aggravating and mitigating circumstances, considers that a sentence of life imprisonment constitutes the only sanction commensurate with the crime. Life imprisonment is not necessarily or automatically imposed for any offense, no matter how serious.

72. The imposition of a sentence of life imprisonment on adults who commit particularly serious offenses is not in itself prohibited by Article 3 or any other provision of the Convention and does not conflict with to the latter *(Murray v. Netherlands* [GC], no. 10511/10, § 99, ECHR 2016, *Vinter and others,* cited above, § 102, and *Kafkaris,* cited above, § 97). This is even more true in the case of a sentence that is not mandatory but imposed by a judge.

independent who will have considered all the mitigating and aggravating circumstances specific to the specific case *(Vinter and others,* cited above, § 106).

73. The Court has repeatedly recalled that the Convention is a living instrument to be interpreted in the light of current living conditions and the conceptions prevailing today in democratic States *(Tyrer v. United Kingdom,* April 25, 1978, § 31, Series A no. 26, *Kress v. France* [GC], o 39594/98, § 70, ECHR 2001-VI, and n *Austin and Others v. United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 53, ECHR 2012). It also stressed that any interpretation of the rights and freedoms guaranteed therein must be reconciled with the general spirit of the Convention, which aims to safeguard and promote the ideals and values of a democratic society (Svinarenko and Slyadnev v . *Russia* [GC], nos. 32541/08 and 43441/08, § 118, ECHR 2014 (extracts)). Thus, the notions of inhuman and degrading treatment and punishment have evolved considerably since the entry into force of the Convention in 1953. Progress made towards the complete de facto and de jure abolition of the death penalty *in* the *member* States of the Council of Europe constitutes an illustration of the ongoing developments in this regard. The territories under their jurisdiction now form a death penalty-free zone, and the Court accepted that the exposure of an applicant to a real risk of being sentenced to death and executed elsewhere could raise a question regarding of Article 3 of the Convention *(Soering v. the United Kingdom,* 7 July 1989, §§ 102-104, series A o 161, *Al-Saadoon and Mufdhi v. the United Kingdom,* no. 61498/08, §§ 115 -118 and 140-143, ECHR n 2010, and *AL (XW) v. Russia,* no. 44095/14, §§ 63-66, October 29, 2015).

74. The situation is different with regard to life imprisonment. As things currently stand, life imprisonment as a sanction for particularly serious offenses remains compatible with the Convention. The idea that the imposition of a life sentence on an adult could raise a question under Article 3 due to its irreducible nature is relatively recent *(Kafkaris,* cited above, § 97). In the *Vinter and Others* judgment (cited above), the Court reached the following conclusion:

> “119. (...) [T]he Court considers that with regard to life sentences, Article 3 must be interpreted as requiring that they be reducible, that is to say subject to review allowing it is up to the national authorities to determine whether, during the execution of his sentence, the detainee has evolved and progressed so much on the path to reform that no legitimate penological reason can no longer justify his continued detention.
>
> 120. The Court wishes, however, to emphasize that, taking into account the margin of appreciation which must be granted to the Contracting States in matters of criminal justice and sentencing (...), it is not its task to dictate the form (administrative or judicial) that such a review must take. For the same reason, it does not have to say when this review must take place. That being said, it also notes that elements of comparative law and international law emerge

> produced before it a clear trend in favor of the establishment of a special mechanism guaranteeing a first review within a period of twenty-five years at most after the imposition of the life sentence, then periodic reviews thereafter (.. .)
>
> 121. It follows that, where national law does not provide for the possibility of such a review, an actual life sentence disregards the requirements arising from Article 3 of the Convention.
>
> 122. (...) A prisoner sentenced to life imprisonment has the right to know, from the start of his sentence, what he must do for his release to be considered and what conditions apply. He has the right, in particular, to know when the review of his sentence will take place or may be requested. Therefore, in the event that national law does not provide for any mechanism or possibility of review of actual life sentences, the resulting incompatibility with Article 3 arises from the date of imposition of the life sentence and not from a later stage of detention. »

75. It follows from the above that while Contracting States are in principle free to decide whether life imprisonment constitutes an appropriate sanction for particularly serious offences, their discretion in this regard is not unlimited and is subject to certain requirements. minimal. The Convention must be read as a whole and interpreted in such a way as to promote its internal coherence and harmony between its various provisions *(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 *Kudÿa v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI). It follows that when a State, in the exercise of its discretionary power, takes measures with a view to complying with such minimum requirements or to promoting their objectives, great weight should be given to them. moment to assess the proportionality of the measure in question in the context of Article 14 taken together with Article 5 of the Convention.

76. The applicants were sentenced to life imprisonment following an adversarial trial during which they were able to submit arguments in support of their defense and express their views on the appropriate sanction to be imposed on them. Even though they initially alleged that the criminal proceedings against them were tainted by procedural shortcomings, the Court, after carefully examining their complaints in this regard, dismissed them as unfounded (see the decisions of September 27, 2011 and of May 13, 2014 mentioned in paragraph 4 above). The decisions taken at the end of the applicants' trials were based on the facts specific to their cases and the sentence imposed on them was the result of an individualized application of criminal law by the trial court, whose discretion as to the choice of the appropriate sentence was not restricted by the provisions of Article 57 § 2 of the Penal Code. In these conditions, and having regard to the penological objectives of the protection of society and deterrence at the collective and individual level, the life sentences imposed on the applicants appear neither arbitrary nor abusive.

Furthermore, those concerned will be able to claim early release after having served the first twenty-five years of their sentences, subject to having fully respected the prison rules during the three years preceding the request for release (article 79 § 5 of the Penal Code). Consequently, the present case does not raise any questions comparable to those which arose in the *Vinter and others* cases or, more recently, *Murray,* cited above.

77. The Court recalls that Contracting States enjoy a certain margin of appreciation in determining whether and to what extent differences between otherwise similar situations justify distinctions in treatment. The extent of the margin of appreciation varies according to the circumstances, areas and context, but it is for the Court to make the final decision on compliance with the requirements of the Convention *(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 said that differences based on sex must be justified by particularly serious reasons, and that references to traditions, general presuppositions or majority social attitudes current in a given given country cannot in itself be considered to constitute sufficient justification for the difference in treatment in question, any more than can stereotypes of the same order based on race, origin, color or sexual orientation (Konstantin *Markin ,* cited *above ,* § 127 , _ _ _ _ _ § 109, ECHR 2014). On the other hand, the Court also declared that it did not have to say what should be the duration of n incarceration for this or that offense nor what should be the duration of the sentence, prison or other, that will be served a person after his conviction by a competent court *(Vinter and Others,* cited above, § 105; see also *T. v. United Kingdom,* cited above, § 117, *V. v. United Kingdom*

cited above, § 118, and *Sawoniuk,* aforementioned decision).

79. In determining the scope of the margin of appreciation to be granted to the respondent State, the existence or absence of a consensus at European level may also constitute a relevant factor. The Convention being above all a mechanism for the protection of human rights, the Court must take into account the evolution of the situation in the respondent State and in the Contracting States in general and react, for example, to the consensus likely to 'appear as to the goals to be achieved (see, *mutatis mutandis, Schwitzgebel,* cited above, §§ 79-80, *Dickson v. United Kingdom* [GC], o 44362/04, § 81, ECHR 2007-V, n *Fretté v. France ,* no. 36515/97, § 40, ECHR 2002-I, and *Petrovic v. Austria,* March 27, 1998, § 38, *Reports of Judgments and Decisions* 1998-II; see also *Biao,* cited above, §§ 131-133).

80. Firstly, the Court sees no reason to question the difference in treatment applied to the group of adult offenders to which the applicants belong, who are not excluded from life imprisonment, compared to that of juvenile offenders *who , ,* are excluded. In reality, this exclusion is compatible with the approach common to the legal systems of all Contracting States without exception, namely the abolition of life imprisonment for offenders considered juveniles under the respective domestic laws (paragraph 20 above). The said exclusion is also in line with the recommendation of the Committee on the Rights of the Child to abolish all forms of life imprisonment for offenses committed by persons under the age of 18 and with the Resolution of the General Assembly of United Nations inviting States to consider abolishing all forms of life imprisonment for this category of persons (paragraphs 25 and 26 above). Obviously, its aim is to facilitate the reformation of juvenile delinquents. The Court considers that when young offenders are called to account for their actions, regardless of the seriousness, this must be done in a manner that takes into account their presumed mental and emotional immaturity, as well as their greater malleability and their capacity for amendment and reintegration.

81. Secondly, to the extent that the applicants complain about being treated differently from those *aged 65 or over* – the other age group excluded from life imprisonment – it should be noted that, in accordance with the above-mentioned principles which were identified in the *Vinter judgment,* a sentence of life imprisonment will be compatible with Article 3 only if it offers both a prospect of release and a possibility of review (both elements having to be present from the moment of the imposition of the sentence). Having regard to this requirement arising from the Convention, the Court sees no reason to consider that the relevant provision of domestic law excluding offenders aged 65 or over from life imprisonment lacks objective and reasonable justification. As can be seen from the evidence available to the Court, the aim of this provision coincides in principle with the interests underlying the possibility of claiming early release after the first twenty-five years of detention for adult male offenders. aged under 65, such as the applicants, described in the *Vinter* judgment as being a common approach in national legal systems where life imprisonment can be imposed (paragraph 74 above). The compressibility of a life sentence is even more important for older offenders if we want to prevent the prospects of release from becoming a mere illusory possibility for them. By limiting the imposition of life sentences by setting a maximum age limit, the Russian legislator used one of the possible methods at his disposal

to ensure prospects of release for a reasonable number of prisoners. In doing so, it therefore acted within its margin of appreciation in accordance with the standards of the Convention.

82. Thirdly, to the extent that the applicants complain of being treated differently from adult *women* in the same age category as them (18 to 65 years), whom the legislator excluded from life imprisonment due to of their sex, the Court takes note of the various European and international instruments which address the protection needs of women against gender-based violence, abuse and sexual harassment in the prison environment, as well as the need to protect pregnant women and mothers (paragraphs 27 to 30 above).

The Government presented statistical data indicating a considerable difference between the total number of male prisoners and the total number of female prisoners (paragraph 48 above), and also highlighted the relatively small number of prisoners sentenced to life imprisonment. *(ibid.).* It is not for the Court to reconsider the assessment by the national authorities of the data in their possession or of the penological reasoning that such data seeks to support.

In the particular circumstances of the case, the available data together with the above elements provide the Court with sufficient basis for it to conclude that there is a general interest justifying the exclusion of women from life imprisonment by a global rule.

83. The Court further observes that, beyond the consensus which has emerged in favor of not imposing life imprisonment on juvenile offenders and the possibility of subsequent review in legal systems which impose such sentences to adult offenders *(Vinter and Others,* cited above, § 120), there is hardly a common denominator in the domestic legal systems of the Contracting States in this matter. While life imprisonment does not exist in nine Contracting States, either because such a sentence is not provided for or because it has been abolished at some point (paragraph 19 above), a majority of Contracting States have chosen to retain the possibility of sentencing offenders to life imprisonment for particularly serious offences. This last group does not present any homogeneity as to the age below which the exclusion from life imprisonment applies; many States have set this age at 18 years, in others it varies between 18 and 21 years (paragraph 20 above).

84. The disparity in approaches for other groups of offenders that Contracting States have chosen to exclude from life imprisonment is even more marked. Some Contracting States have established a specific sentencing regime for offenders between 60 and 65 years of age (paragraph 21 above). Other Contracting States have decided to exclude from life imprisonment women who were pregnant at the time of the commission of the offense or the passing of the sentence. And another

a group of States, including Russia, have extended this approach to all women (paragraph 22 above).

85. The Court considers it normal that national authorities, who must also take into consideration, within the limits of their powers, the interests of society as a whole, should have wide latitude when called upon to rule on sensitive issues such as penal policies. Furthermore, the area in question must always be considered as a sector where rights evolve, without established consensus, and where States must also benefit from a margin of appreciation to choose the pace of adoption of legislative reforms (compare with *Schalk and Kopf v. Austria,* no. 30141/04, § 105, ECHR 2010). Since the delicate questions raised in this case concern areas where there is little commonality of views between the member States of the Council of Europe and where, generally speaking, the law appears to be going through a phase of transition, there is reason to grant a wide margin of appreciation to the authorities of each State.

86. It therefore appears difficult to criticize the Russian legislator for having decided to exclude, in a manner which reflects the evolution of society in this area, certain groups of offenders from life imprisonment. Such exclusion represents, on balance, social progress in penological matters (compare with *Petrovic,* cited above, § 41). The situation in the present case is different from that which prevailed in cases where the Court was able to note a broad and evolving consensus leading to modifications in the domestic law of the Contracting States on a given point (compare with Konstantin Markin, cited above, *§* 140 , *Smith and Grady v. United* n *Kingdom,* os 33985/96 and 33986/96, § 104, ECHR 1999-VI, and *Vallianatos and others,* cited above, § 91). The Court does not discern any international trend in favor of the abolition of forms of life imprisonment or which, on the contrary, would indicate positive support for this type of punishment. It notes, however, that life imprisonment is limited in Europe by the requirement of compressibility of the sentence *(Vinter and others,* cited above, § 119) which could in the future generate other positive obligations for the Member States *(Murray,* cited above, §§ 124–125). In the absence of a common denominator regarding the imposition of life imprisonment, the Russian authorities did not exceed their margin of appreciation. Despite the more favorable situation in which the perpetrators of offenses comparable to those committed by the applicants find themselves, the legislation on the basis of which the sanctions were imposed on the applicants and which they contest does not constitute a violation of applicable international law nor does it stand out from the solutions adopted by other member States of the Council of Europe in this matter (compare with *Sc*

87. In short, even if the respondent State clearly has the possibility, with the aim of promoting the principles of justice and humanity, of extending the exclusion of life imprisonment to all categories of

offenders, he is not required to do so under the Convention, as currently interpreted by the Court. Furthermore, having regard to the practical application of life imprisonment in the Russian Federation, with regard to both the methods of imposition and the possibility of subsequent review, as well as the interests of society in its taken together insofar as they are compatible with the Convention and the ample margin of appreciation which it recognizes for the respondent State in this area, the Court considers that there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought.
It concludes that the disputed exclusions do not constitute a prohibited difference in treatment for the purposes of Article 14 taken in conjunction with Article 5. In concluding thus, the Court took full account of the need to interpret the Convention in a manner harmonious and in accordance with its general spirit.

88. In light of the above considerations, the Court considers that there has been no violation of Article 14 of the Convention taken in conjunction with Article 5, both with regard to the difference in treatment based on age as regards the difference in treatment based on 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 together with Article 5 with regard to the difference in treatment based on age;

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

Done in French and English, then delivered in public hearing at Human Rights Palace, in Strasbourg, January 24, 2017.

Roderick Liddell
Clerk

Guido Raimondi
President

This judgment is attached, in accordance with Articles 45 § 2 of the Convention and 74 § 2 of the regulations, the presentation of the following separate opinions:

– concurring opinion of Judge Sajó;
– concurring opinion of Judge Nußberger;
– concurring opinion of Judge Turkoviÿ;
– concurring opinion of Judge Mits;
– partly dissenting opinion common to judges Sicilianos, Møse, Lubarda, Mourou-Vikström et Kucsko-Stadtmayer ;
– dissenting opinion of Judge Pinto de Albuquerque.

G.R.
R.L.

CONCURRING OPINION OF JUDGE SAJÓ

1. I agree with the conclusion that the difference in treatment based on sex or age did not result in a violation of Article 14 of the Convention taken together with Article 5. However, in this regarding the allegation of discrimination on grounds of sex, it is considerations different from those of the majority which lead me to this conclusion.

2. Our Court, like other courts, has repeatedly said that differences based on sex must be justified by particularly serious reasons and that references to traditions, general presuppositions or majority social attitudes current in a given country is not enough to justify a difference in treatment, any more than can similar stereotypes based on race, origin, color or sexual orientation. When men and women are treated differently, the presumption is that this is a sign of sex discrimination. This presumption is justified by a long history of unacceptable treatment of women. Furthermore, even when they favor women, gender-based differences often reflect deep-seated biases and misogynistic stereotypes that cannot be allowed to underpin government policy.

3. Under Russian law, life sentences cannot be imposed on women convicted of a crime, but can be imposed on men. The applicants consider that this difference in treatment is discriminatory and therefore violates the Convention.

4. One way of viewing this case would be to consider that it does not fall within the scope of Article 5. It is true that the applicants are in a situation of lawful detention following conviction by a competent court (Article 5 § 1 a)); but it is precisely because they are in this situation that they cannot invoke the right protected by Article 5: having been convicted by a competent court, they have no right to freedom. What they are asking for is not to be subjected to a compressible life sentence. However, according to *Vinter* case law , this is not a right protected by the Convention. In the present case, the Court considers that the applicants "do not complain about the severity of the sanction as such or the length of their sentences" (see paragraph 54 of the judgment), but it is contrary to exactly what they are complaining about. In any event, the Court found Article 14 applicable, and it is on this basis that the case must be decided[1] .

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1. In its reasoning in the present case (see paragraph 56), the Court relies on the *Gerger v. Turkey* ([GC], no. 24919/94, § 69, July 8, 1999). In this case, which concerned the possibility for a prisoner sentenced to life imprisonment to benefit from conditional release, the Court said that "if Article 5 § 1 a) of the

5. The applicants are not victims of discrimination because their situation is not made worse by the fact that women convicted of a crime cannot receive a sentence of life imprisonment. Nothing in the imposition of a reduced life sentence on a criminal is likely to result in a violation of the Convention. The guilty person receives the punishment that the judge considers appropriate. He is not discriminated against. Women (a class of people) do not receive the same punishment. It could be argued that the most serious crimes committed by women are different from those committed by men (see for example the high number of cases of – generally provoked – domestic violence or neonaticide)2 .

Female crime is much less common than male crime, and can therefore be considered to require less deterrence. It is not unreasonable for the legislator to establish a distinct category for the purposes of the sanction, based on the principle that for such category of persons a less severe sanction will be sufficient. Furthermore, women who have committed a crime generally do not pose the same security problem as men3 . And they present a lower risk of recidivism. It is true that women can commit particularly heinous crimes (for example, they can participate in the commission of terrorist acts), but the question is not whether there are rare cases in which they commit the same crimes as men, but to determine whether the State is justified in creating different categories for the purposes of inflicting the sanction in the general perspective of prevention and deterrence. It is regrettable that the Russian government has not provided adequate data, but that does not mean that some basic public data cannot be taken into account.

Convention does not guarantee the right to conditional release, a question may arise in the context of this provision combined with Article 14 of the Convention when a well-established policy regarding the fixing of sentences is likely to affect situations individuals in a discriminatory manner" (see also, to the same effect, *Clift,* cited above, § 42). It is not because "a question *may* arise" that it actually arises.

2. For example, a diachronic study concerning Sweden revealed that the victims of homicides committed by women were often men, killed by their partner using a sharp instrument while they were in a state of drunkenness. A history of violence between the victim and her attacker (which constitutes an extenuating circumstance) was also more common in the case of female criminals. 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. 125-135. This corresponds to a pattern observed for a long time in Europe. See Rosemary Gartner and 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.

6. The Court has always recognized that States have at least a wide margin of appreciation in matters of policy and imposition of punishment. I do not recall a single case where it found a violation of Article 14 of the Convention taken in conjunction with Article 5 on the sole ground that for a supposedly identical crime two people had received two different sentences.
On the contrary, we find in the *Kafkaris v. Cyprus* ([GC], no. 21906/04, § 161, ECHR 2008) the following passage:

> "(...) Article 14 does not prevent a distinction in treatment if it is based on an objective assessment of **essentially different factual circumstances** and if, inspired by the public interest, it strikes a fair balance between the safeguarding the interests of the community and respect for the rights and freedoms guaranteed by the Convention (see, among others, *GMB and KM v. Switzerland* (dec.), no. 36797/97, 27 September 2001). Contracting States enjoy a certain margin of appreciation in determining whether and to what extent differences between otherwise similar situations justify distinctions in treatment *(Gaygusuz v. Austria,* 16 September 1996, § 42, *Reports* 1996 -IV). The extent of the margin of appreciation varies according to the circumstances, areas and context (...)"

7. Furthermore, I believe that for the same length of imprisonment, a woman will suffer more than a man, if only, for example, because she cannot be a mother. This consideration may appear to be a simple gender stereotype, although some would say that the female brain presents specificities and biological differences. But in a society where women are expected to have children and where young girls are raised in a social context which conditions them to believe that they can only flourish in motherhood, a woman will suffer from not having achieved this expectation imposed by society. Whatever the reasons, the suicide rate, which is already high in detention, is even higher among women (compared to the general population)4 . These figures reveal the additional burden borne by women serving very long prison sentences.

8. These remarks aim to demonstrate that there are additional reasons to consider that male and female prisoners are not in similar situations.

9. However, the fundamental reason why I cannot consider the difference in question to be discriminatory is neither the wide margin of appreciation applicable in terms of categories of punishment and sanctions nor the fact that one and the other other sexes are not in a similar situation when faced with the sanction imposed. The fundamental reason is that this difference does not worsen the situation of male prisoners. There is no reason to invoke discrimination when (despite all legal extensions) the disadvantageous situation has nothing to do with the difference.
This situation results from a deserved sanction and not from the exclusion of a

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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.

advantage granted to others (as was the case in *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts)). Unlike people excluded from access to a service or benefit, in which case the exclusion may be discriminatory because it is based on unacceptable reasons, the applicants in the present case were not deprived of a benefit. Nor were they punished more harshly than they deserved because of their sex; they suffered no disadvantage.

The element of comparison is not the punishment inflicted on others but the punishment deserved by those concerned. An amnesty or pardon cannot be successfully challenged on the grounds that certain people did not benefit from it (such a measure may, however, violate the State's obligation to protect life, for example in the event of impunity – see *Kafkaris,* cited above, § 154).

10. Although the ordinary logic of contemporary analysis of discrimination most of the time allows satisfactory results to be obtained, it cannot be applied mechanically in all cases.

Here we find ourselves in the presence of a case where it cannot be applied, and where we must return to the original meaning of the term discrimination, namely the fact of putting someone in a worse situation, or of preventing them from access to a better situation, for unacceptable reasons. However, the applicants were neither put in a worse situation nor prevented from accessing a better situation; they simply got what they deserved: they were punished. Seen from this angle, the request borders on an abuse of the right to appeal.

CONCURRING OPINION OF JUDGE NUSSBERGER

(Translation)

1. Sometimes, “the best is the enemy of the good” – this proverb by Voltaire is famous. In the present case of *Khamtokhu and Aksenchik v. Russia,* the best solution would have been, as the minority believes, to find a violation of Article 5 combined with Article 14 of the Convention. Such a solution could easily be justified in light of the Court's case law, which is based on the idea that "only very strong considerations can lead the Court to consider a difference in treatment based exclusively on sex compatible with the Convention." » (Van *Raalte v. Netherlands,* February 21, 1997, § 39 *in fine, Reports of judgments and decisions* 1997-I, *Petrovic v. Austria,* March 27, 1998, § 37, *Reports* 1998-II, and *Stec and others v. United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI). Our colleagues, Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer convincingly argue in their dissenting opinion that there are no such "very strong considerations" to justify that only men can be sentenced to life imprisonment.

2. However, even if a finding of violation was the “best solution”, it would not be a “good solution”.

3. In isolation and not linked to the violation of any other provision of the Convention, a violation of the prohibition of discrimination enshrined in Article 14 differs from all other possible violations of the Convention. States parties have two options to remedy this: they can end the more favorable treatment enjoyed by one group or grant this treatment to other groups as well.

4. It would be possible to require Russia to completely abolish life imprisonment if there was a European consensus in this regard (see, among many other precedents, Demir and Baykara *v. Turkey* [GC], o 34503/97, § n 85, ECHR 2008, and *Bayatyan v. Armenia* [GC], no. 23459/03, §§ 102-103, ECHR 2011). However, as the research report shows, there are currently only nine Council of Europe member states where life imprisonment is not provided for (paragraph 19). Therefore, there is no consensus either on the need to include this type of sentence in the sentencing policy or on its abolition. This second approach has even fewer supporters than the first. In such a context, Article 53 of the Convention cannot be interpreted as reducing to nothing the wide existing margin of appreciation in matters of sentencing policy, and this only for States which have a more protective position. of some people, but not all (on this point, see also the concurring opinion of Judge Turkoviÿ). Such an approach would be an obstacle to any desire for reform.

5. I share the view of the minority that the arguments put forward in the judgment to justify the more favorable treatment reserved for women are not really convincing. In my opinion, the Court should rather have followed exclusively the reasoning adopted in the *Petrovic* case (cited above), which has many similarities with the present case.
First, it is not disputed that there is a difference in treatment based on sex. Secondly, it is clear that there is no common standard in the policies of Council of Europe member states.
Third, the contested measure (in this case, the abolition of life imprisonment and, in the *Petrovic case,* the granting of parental leave allowance) can be seen as a positive recent development. It is true that when the Court ruled on the *Petrovic case,* Austria had already amended the legislation in question and paid parental leave allowance to both men and women, and was therefore moving in the desired direction. However, it seems to me that in this case we can draw the same conclusion as in the *Petrovic* judgment : it seems difficult to criticize the respondent State for having introduced gradually, and therefore not immediately for all, a measure advancing the protection of human rights, or even, as the Russian government describes it, a measure based on principles “of justice and humanity” (paragraph 70).

6. Certainly we can only hope in this case that the measure taken by Russia reflects the evolution of society in this area and that, in the near future, the ideals of justice and humanity will also find support. apply to the policy of setting sentences inflicted on men. But a state should not be punished for taking a step in the right direction simply because it has not taken the next step.

7. The third party intervener as well as the dissenting judges clearly identified the dilemma posed by the present case and they attempted to resolve it by referring to an “individualized approach to sentencing” (paragraph 52 of the judgment) or to a “rearrangement of the sentence in question and the terms of its execution” (paragraph 20 of the joint dissenting opinion). But neither of these solutions is appropriate.
The question that arises is not that of the sentences imposed in specific cases, but the much more general question concerning the extent to which life imprisonment can be retained in the laws as a threat provided for in *of ultima ratio* in cases of atrocious crimes. In Russia it is believed that this is necessary only for men. I voted in favor of no violation, because I cannot accept that we also introduce such a threat as *an ultima ratio* for women. It would be deplorable if such a step back were justified by the need to execute a judgment of the Court, moreover under the supervision of the Committee of Ministers. This risk is too great and too real for me.
Unfortunately, in this complicated matter, I see no solution

intermediary that would enable a forward-thinking approach to gender equality within the framework set by the Convention.

CONCURRING OPINION OF JUDGE TURKOVIÿ

1. The Court was faced in this case with an unusual and complex question. The question was whether life sentences, which are currently not considered intrinsically contrary to human dignity but which relatively recently have become limited in that they must be subject to reduction and which in the future could be sources of additional positive obligations for Member States (see paragraph 86 of the judgment), could be gradually abolished for certain categories of persons without there being a violation of Article 14 of the Convention. The Grand Chamber was almost unanimous in considering that, in the case of criminals aged under 18 or over 65, the difference in treatment was sufficiently justified under Article 14 of the Convention. On the other hand, it was relatively divided on the question of the abolition of the life sentence for adult female criminals but not for men.

I will therefore only deal with this last question.

2. When it found the difference in treatment justified, the Court took note, on the one hand, of the various European and international instruments relating to the protection needs of women against gender-based violence, abuse and harassment sexual activity in the prison environment and the need to protect pregnant women and mothers and, on the other hand, the statistical data presented by the Government, which showed a considerable difference between the total number of male prisoners and the number total number of women prisoners and according to which the number of prisoners sentenced to life imprisonment was relatively small (see paragraph 82 of the judgment).

3. The minority rightly criticizes the majority for having very insufficiently analyzed questions of equality and gender and for having avoided a debate on possible stereotypes and their implications (see paragraphs 45 to 48 of the judgment). In my opinion, the Court should not give up putting a name to the different forms of stereotypes, it should always examine the injustice they constitute. It is impossible to change reality without naming it[1] . It should therefore have been recognized in the present case that the reasoning of the respondent State regarding the legislation exempting women from the sentence of life imprisonment characterizes them as a naturally vulnerable social group (Khamtokhu and Aksenchik v. Russia (dec .) no 60367/08, 961/11, § 22, May 13, 2014) and is thus marked by judicial paternalism. That being said, I voted with the majority. I consider that the present case is what we call a "hard case" [2], which calls for a broader contextual analysis

1. Catharine MacKinnon, "Women's Lives, Men's Laws" 89 (2005) ("[Y]ou can't change a reality you can't name").

based on the principles enshrined in the Convention considered as a whole. I believe that in considering this case, consideration must be given to the criminological and penological literature on gender and sentencing as well as how the alleged discrimination could be remedied.

4. The criminological literature virtually ignores the case of women sentenced to life imprisonment, and there are very few comparative studies aimed at understanding the respective and relative experiences of women and men sentenced to life imprisonment3 . According to a recent criminological study, “men and women experience long-term prison sentences differently: if both feel the “pain linked to deprivation of liberty”, “gender” is a key variable of differentiation of this experience »4 .

Women interviewed in this study felt the problems associated with long-term imprisonment more keenly than men on all analytical “dimensions” measured. Regarding “mental balance”, for example, the suffering score of women was almost twice as high as that of men5 . Women were also much more prone to problems of “trust” and loss of “control” over their lives in detention6 . and the problem of “losing contact with family and friends” also had higher scores among them. In the Russian prison system, this last dimension would be likely to be exacerbated. Recent research on "inherited penal geography" in Russia, and in particular on the impact of Russia's specific penal geography on the family relationships of prisoners, demonstrates that, combined with traditional ideas about the role of women that shape the attitude of the prison services towards female prisoners in

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2. Voir Ronald Dworkin, “Hard Cases”, 88 Harvard L. Rev. 1057 (1975).

3. After several classic sociological studies carried out in the 1970s and 1980s, the literature lost interest in prisoners sentenced to life imprisonment.

4. See the recent study on gender and suffering in long-term imprisonment carried out by the Prison Research Center at the University of Cambridge, at: https://prisonwatchuk.com/ 2016/ 01/19/gender-and-the-pains-of-long- life-imprisonment/. The study's authors interviewed 126 men and 19 women serving life sentences in the UK, including 15 years or more as the minimum, which had been imposed on them when they were 25 or less. The article describing the results of the study is still in progress: Crewe, B., Hulley, S. and Wright, S. (2016, in progress), “The gendered problems of long-term life imprisonment” .

5. The study authors themselves noted that men's tendency to describe their problems as less serious may have been linked to the culture of masculinity in prisons, and they suspected that men were downplaying their responses. the “suffering” they felt *(ibidem).*

6. Accounts of sexually threatening and inappropriate behavior by male guards in women's prisons also fueled feelings about these issues; However, it was very rare for the men's accounts of their detention to mention such behavior *(ibidem).*

Russia, it increases the “suffering linked to deprivation of liberty” for women7 .

5. Consultation of the criminological and penological literature reveals that in the twenty-first century, while efforts are being made to make the sentences imposed on women less harmful to them and their families and more likely to reduce social harm suffered, questions relating to these sentences are always fraught with confusion and contradictions8 . While some supporters of penal reform advocate the imposition of differentiated sentences on men and women based on their dangerousness, the value of their role in society and the legitimacy of the sanction, others believe that it is necessary to ensure parity in this area and to associate the provisions concerned with a regime taking into account sexual specificities. It follows from all of this literature that formal equality in the imposition of sentences is not in itself a solution to the problem that contemporary societies face with regard to their penal systems in relation to women prisoners9 . It is much more than equality in punishment that is necessary to achieve material and transitive equality between criminals/prisoners of both sexes – we cannot simply reproduce the mechanisms provided for men in the hope that 'They will work for women. It is unlikely that in the near future the Russian prison system will be remodeled in such a way that it comes close to equalizing the effects of life sentences between women and

7. The authors Pallot and Piacentini (see Judith Pallot and Laura Piacentini, “Gender, Geography and Punishment – The Experience of Women in Carceral Russia”, Oxford University Press, 2012) convincingly defend the thesis that the use of Geographical distancing in the Russian prison system (Russian prisoners of both sexes are sent to serve their sentences away from their homes, families and any social support) is a form of punishment, and that this is particularly true for female prisoners. According to them, the entire incarceration process is part of the sentence.

8. Voir Pat Carlen, « Introduction: Women and Punishment », *in* « Women and Punishment – the struggle for justice », pp. 3-20, à la p. 5 (éd. Pat Carlen, 2002).

9. Lady Corston wrote a report in which, while she did not rule out the need for a separate sentencing framework for women in the future, in light of the legal duty to take concrete measures to eliminate discrimination based on sex and promote equality under the Equality Act , she considered that although this might be necessary later, there was no need at all when she was writing her report to issue a recommendation to this effect for the United Kingdom (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, UK Home Office, http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf – accessed November 28, 2016).

of 2007, has

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men to prevent women serving life sentences from suffering disproportionately10 .

6. In the present case, the Court was faced with a real dilemma. The Government indicated that in the event of a finding of a violation, the envisaged remedy would be a race to the bottom (see paragraph 42 of the judgment). When the Court finds a violation of the prohibition of discrimination enshrined in Article 14 but not of the corresponding substantive law (as explained in paragraph 53 of the judgment, the violation of Article 14 does not presuppose a violation of the one of the material rights guaranteed by the Convention), there are two ways of redressing this violation: we can either withdraw from everyone the advantage previously granted to certain people only (levelling down) or extend it to all (levelling from above)11 .

7. Contrary to what the third party intervener asserts (see paragraph 52 of the judgment), the Court has never interpreted Article 53 of the Convention12 in this type of situation as requiring Member States to remedy the situation. violation of Article 14 by means of a race to the top rather than to the bottom. In short, it has never declared a race to the bottom illegitimate in such cases. Contracting States are in principle free to choose the means by which they will comply with the judgment in which the Court found the violation. This power of appreciation regarding the

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10. This is not to say that the conditions of detention of male prisoners sentenced to life imprisonment in Russia are acceptable from the point of view of the Convention (these conditions were strongly criticized in the Khoroshenko *judgment (Khoroshenko v. Russia* [GC], no. 41418/04) as well as in the concurring opinion that Judge Pinto de Albuquerque and I expressed on this judgment), nor that it is not desirable to abolish life sentences for men as well. On the contrary, I consider the abolition of life sentences to be a Pareto optimum in a democratic society guided by the principle of humanity.

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

12. According to the Court's interpretation, Article 53 of the Convention leaves States Parties the possibility of offering persons within their jurisdiction more extensive protection than that required by the Convention (see, for example, Suso *Musa v. Malta,* no. 42337/12, § 97, July 23, 2013, *and Okyay and Others v. Turkey,* no. 36220/97, § 68, ECHR 2005 VII). Thus, the Convention must strengthen the protection offered at the national level, without ever imposing limits on it *(United Communist Party of Turkey and others v. Turkey,* January 30, 1998, § 28, *Reports of judgments and decisions* 1998-I, *Chamaïev and others v. Georgia and Russia,* no. 36378/02, § 500, ECHR 2005 III, and *Micallef v. Malta,* o n 17056/06, § 44, January 15, 2008). The Court has repeatedly emphasized that when a Member State takes measures to protect individuals which fall within one of the rights protected by the Convention, but go beyond what the Convention requires, it cannot apply these measures in a discriminatory manner (see, *mutatis mutandis,* the case *“relating to certain aspects of the linguistic regime of education in Belgium” v. Belgium* (merits, July 23, 1968, § 9, series A no. 6).

modalities of execution of a judgment reflects the freedom of choice which is accompanied by the primordial obligation imposed by the Convention on the Contracting States: to ensure respect for the rights and freedoms guaranteed (see, among others, Papamichalopoulos and others v. Greece *(article* 50), October 31, 1995, § 34, Series A no. 330-B). In other words, it reflects the subsidiary nature of the Court's role. This applies *a fortiori* when a Member State guarantees on its own initiative a right which is not as such protected by the Convention, any preference in the sense of an extension of rights must in principle fall within the competence of the authorities internal courts, which, as the Court has often emphasized, are better placed than the international judge to determine what is in the public interest *(Khoroshenko v. Russia* [GC], no. 41418/04, § 120, ECHR 2015) . This is particularly true when remedying a violation involves changing legal rules.

8. Demanding that Russia abolish life sentences for all would only be possible if the imposition of such sentences was itself prohibited by Article 3 or inconsistent with it or another article of the Convention, which is not currently the case (see paragraph 72 of the judgment).

9. Both possible types of redress – leveling up or leveling down – would result in formal equality, but they would not necessarily both produce desirable results. In this case, a race to the bottom would be problematic for several reasons. First, it would worsen the situation of women criminals without improving that of men. Second, an identical sanction is not always an equal sanction, and the application of simple formal equality would still not achieve substantive equality.

Third, what is at stake in this case is not a trivial matter: a race to the bottom would reverse the trend of restricting the imposition of life sentences.

10. Where a leveling down is not desirable or acceptable and a leveling up is most likely unachievable, and otherwise formal equality would not necessarily result in material equality, it may be preferable to maintain a status quo where the situation of some is better and that of others is no worse than if we implemented the best possible equality. This is particularly true in this case, where the issue is of completely fundamental importance.

11. Even if the Court was not able to discern an international trend going either in the direction of the abolition of life sentences or in the opposite direction, it noted a progressive social evolution in penological matters towards an exemption from the life imprisonment (see paragraph 86 of the judgment). The sentence of life imprisonment as the ultimate sanction raises many of the same objections as those raised against the death penalty. So I totally agree with the judges

Nuÿberger and Mits to say that it was important for the Court to view this case from a broad perspective and taking into account the spirit of the Convention as a whole as an instrument for the promotion of human rights (see paragraphs 73 and 75 of the judgment). The right to human dignity has already had an impact in that life imprisonment is today considered acceptable in Europe only under certain conditions *(Vinter and Others v. United Kingdom* [GC], nos. 66069/ 09, 130/10 and 3896/10, § 113, and *Murray v. the Netherlands* [GC], no. 10511/10, § 101). There are serious arguments for the abolition of this penalty. It is therefore better, to the extent that the difference in treatment does not cause additional harm to those to whom the life sentence continues to apply, to tolerate the progressive abolition aimed at groups more vulnerable to the negative impact of the sentences. perpetual, considering it as a step towards complete abolition. Seeing no reasons of principle other than formal equality, which I consider insufficient to conclude that there was a violation in this case, I voted with the majority.

12. Life imprisonment is symbolic of the punishment imposed for the most serious crimes. Unfortunately, as we know, symbols die hard13 .

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

CONCURRING OPINION OF JUDGE MITS

(Translation)

This matter is more complex than it seems at first glance. If we look at it exclusively from the narrow perspective of discrimination, we can reach a conclusion. However, the issue raised in this case goes far beyond the individual interests of the applicants. If we approach the matter from the broader angle of the object and purpose of the Convention (i.e. the safeguarding and development of human rights mentioned in the preamble), the answer may be different. The subject matter of the present case requires a broader approach.

The Convention does not impose any obligation on member states to abolish life imprisonment (paragraphs 74 and 87 of the judgment). The Russian government has made it clear that it intends to maintain it (paragraph 42). If, in the name of equality, the State was obliged to treat groups benefiting from a more favorable approach (minors, people aged over 65 and women) in the same way as the group of people who could be sentenced to life imprisonment, this would lead to extending the application of this sentence to all groups. Thus, without any impact for the applicants, the other groups would be subject to a more severe sentence. This would be an absurd result, contrary to the idea of protecting human rights. Groups benefiting from a more favorable approach do not complain of being deprived of a right to a more severe punishment.

The applicants argued that there was an international trend towards the abolition of life imprisonment (paragraph 41). The Court does not discern any trend, whether in the direction of abolition or that of approval, but it notes that this type of sentence is limited in Europe by the requirement of compressibility of the sentence which could future generate other positive obligations for Member States (paragraph 86). Therefore, at present, developments relating to life imprisonment cannot be equated with those which ultimately led to the abolition of the death penalty. However, there is reason not to slow down developments in the direction of safeguarding and developing human rights. However, the scenario described above would certainly have this effect.

Therefore, when addressing the importance of the issue for all of Europe and beyond, the notion of discrimination must be considered in light of the object and purpose of the Convention, or, as the As the Court has said, it must “interpret the Convention in a harmonious manner and in conformity with its general spirit” (paragraph 87). After all, the present case raises the following question: how do we understand the protection of human rights and fundamental freedoms in Europe?

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

1. We subscribe without reservation to the finding of no violation of Article 14 of the Convention, taken in conjunction with Article 5, with regard to the difference in treatment based on age. We believe, in fact, that the reasons given for not providing for the sentence of life imprisonment with regard to minors and people aged over 65 constitute an objective and reasonable justification for the difference in treatment between these categories of people. and men aged 18 to 65 (see, in particular, paragraphs 69-81 of the judgment). On the other hand, we are not able to follow the majority when it finds that there has been no violation of Article 14, taken in conjunction with Article 5, as regards the difference in treatment based on sex (paragraphs 82 et seq. of the judgment).

I. The principle: only “very strong considerations” justify a difference in treatment based on sex

2. We recall in this regard that the Court has repeatedly declared that differences based exclusively on sex must be justified by “very strong considerations”, “compelling reasons” or, another formula sometimes used, by “particularly reasons solid and convincing” (see, for example, *Van Raalte v. Netherlands,* 21 February 1997, § 39 *in fine, Reports of judgments and decisions* l997-I, *Petrovic v. Austria,* 27 March 1998, § 37, *Reports* 1998 -II, *Stec and others v. United Kingdom* (dec.) [GC], os n 65731/01 and 65900/01, § 52, ECHR 2005-X, *Vallianatos and others v. Greece* [GC], nos 29381/09 and 32684/09, § 77, ECHR 2013 (extracts), and the references cited in this judgment). With regard to differences in treatment based on sex, the margin of appreciation of States is narrow *(X and others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013, *Vallianatos and others,* cited above, § 77). In this vein, the Grand Chamber underlined more particularly "that progress towards gender equality is today an important goal of the member states of the Council of Europe and that only very strong considerations can lead to consider such a difference in treatment compatible with the Convention *(Burghartz v. Switzerland,* February 22, 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland,* June 24, 1993, § 67, Series A no. 263) . In particular, references to traditions, general presuppositions or majority social attitudes current in a given country are not sufficient to justify a difference in treatment based on sex” (Konstantin *Markin v. Russia* [GC],

n o 30078/06, § 127, ECHR 2012 (extracts)). And the Court also observed that contemporary European societies have evolved towards a more egalitarian sharing between men and women of responsibilities in terms of raising children, and that the role of fathers with young children is better recognized (ibidem , § 140). She deduced from this that a general and automatic provision, applied to a group of people based on their sex, regardless of their personal situation, falls “outside the scope of a margin of appreciation, however wide it may be”, and is therefore “incompatible with Article 14” (ibidem, § 148).

3. We observe that these important ideas do not appear in the general principles of this judgment (paragraphs 64-65), but appear later – in an abbreviated version – in paragraph 78. The judgment also refers to a "spirit general" of the Convention, not precisely defined (paragraph 73), and its "internal coherence" (paragraph 75), which seem to prevail over the principle of the prohibition of discrimination based on sex, as defined by this case law .

II. Application of the principle to the present case: the reasons given

4. It is therefore important to examine more closely the considerations put forward by the Government and endorsed by the majority to justify the disputed difference in treatment. These considerations are drawn from: relevant European and international instruments (A), statistical data provided by the Government (B) and trends that seem to prevail in Europe (C). We will consider these considerations in turn.

A) International and European instruments

5. The first consideration tending to justify the disputed difference in treatment based on sex is inspired by "the various European and international instruments which deal with the protection needs of women against sexual violence, abuse and sexual harassment in the prison environment , as well as the need to protect pregnant women and mothers” (paragraph 82 of the judgment). The relevant provisions of the instruments in question are cited *in full* in paragraphs 27 to 31 of the judgment. This concerns more specifically Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations Rules concerning the Treatment of Women Prisoners (Rules of Bangkok), the Resolution of 13 March 2008 of the European Parliament on the particular situation of women in prison, and 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 CEDAW – text only

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

1) Non-binding texts

6. Non-binding texts mainly concern the conditions of detention of women, and particularly pregnant women, breastfeeding women and mothers with young children with them. We fully subscribe to the humanist considerations that drive these instruments. It must be noted, however, that the relevant provisions of the instruments in question do not in any way affect the imposition or not of life imprisonment on women, or even more generally questions of penal policy with regard to women. On the other hand, the provisions cited in paragraphs 23 to 26 of the judgment focus on the prohibition of imposing certain penalties – notably capital punishment and life imprisonment without the possibility of release – on persons aged less than ten years. eight years.

7. In other words, while for minors the relevant international texts relate to the particular aspect which is the subject of the present case, the provisions cited on women essentially concern a distinct subject, namely the conditions of their detention and particularly those categories of women who are the most vulnerable (pregnant, breastfeeding women and mothers with young children). Therefore, the aforementioned instruments apply to *the execution* of any prison sentence imposed on women, regardless of its duration. They do not concern *the imposition* of life imprisonment. Additionally, they only aim to protect women in certain *real-world situations*
(pregnancy, maternity) and are not aimed at all women, solely because of their sex. Their so-called “natural vulnerability”, their “special role in society” and their “reproductive function”, which the Government invokes to justify its position (paragraphs 46 and 47 of the judgment), are precisely not the subject of these rules. In any case, the texts in question do not seem to us to constitute, as such, a “very strong consideration” and even less a “compelling reason” to justify the disputed difference in treatment based on sex.

2) Article 4 of CEDAW and the legal nature of the disputed measures

8. The same applies to Article 4 of CEDAW. In analyzing the first paragraph of this provision, relating to “temporary special measures”, the Committee on the Elimination of All Forms of Discrimination against Women pertinently observed that, among the “fundamental obligations” which are “ at the center of the fight of States against discrimination against women", there is that consisting of "adjusting the relations which predominate between the sexes and fighting against the persistence of stereotypes based on sex which are

harmful to women and whose effects are manifested not only at the level of individual behavior but also in legislation, legal and social structures and institutions.
(General Recommendation No. 25 concerning paragraph 1 of article 4 of the Convention on the Elimination of All Forms of Discrimination against Women relating to temporary special measures, United Nations doc. A/ 59/38 (1st Part), Annex I, paragraphs 6-7).

9. In our opinion, this pronouncement is of great importance for understanding the object and purpose of CEDAW in general and the scope of Article 4 of this convention in particular. This provision concerns “temporary special measures” (paragraph 1) and “special measures” which aim to protect maternity (paragraph 2).

10. As explained in the aforementioned General Recommendation, “temporary special measures” mainly aim to ensure equality of opportunity and, therefore, to promote the establishment of de facto equality between men and women, i.e. that is to say, real (or concrete) equality *(ibidem,* paragraph 8). The measures in question are temporary, in the sense that they “must be repealed as soon as the objectives of equality of opportunity and treatment have been achieved” (Article 4(1) of CEDAW). The same provision also states that the adoption of temporary special measures “shall in no way result in the maintenance of unequal or distinct standards”. However, the disputed measures do not fit well with the aim of this provision. These are, moreover, permanent legislative measures, creating a separate legal regime for women in prison. It therefore appears that the disputed measures do not constitute “special temporary measures” within the meaning of Article 4(1) of CEDAW. This provision is therefore inapplicable to them.

11. Article 4, paragraph 2, of CEDAW refers to the adoption of “special measures, including measures provided for in this Convention, which aim to protect maternity” and which is not considered an act of discrimination. Maternity protection appears in Article 5(b) of CEDAW, which states that States parties “take all appropriate measures to (...) [ensure that family education contributes to understand that motherhood is a social function.” However, the provision par excellence on the subject is that of article 11, paragraph 2, under which the States parties undertake to take appropriate measures to prohibit "under pain of sanctions, dismissal on the grounds of pregnancy or maternity leave” and to establish “the granting of paid maternity leave or entitlement to comparable social benefits, with the guarantee of maintenance of previous employment, seniority rights and social benefits”. It thus appears that the measures provided for by CEDAW to protect maternity fall within family relations and the domain of law.

at work. However, even if we understood Article 4, paragraph 2, of CEDAW in a broader sense, the provisions intended to protect women in matters of "pregnancy and maternity" call for – as an exception to the principle of non-discrimination – a very strict interpretation. This was indicated by the CJEU in the *Johnston judgment,* C-222/84, § 44, with a view to Directive 76/207/EEC (see also *Brown,* C-394/96, § 17; *Commission v Austria,* C-203/03, §§ 43-45; *Stoeckel,* C-345/89, §§ 14-19). It emerges from this case law that maternity protection measures 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 – for both women and men – justify the mitigation of a sentence proportionate to the offense.

12. Furthermore, the other provisions cited in paragraphs 29-31 of the judgment – concerning in particular, it should be remembered, the conditions of detention of pregnant or breastfeeding women, as well as mothers with young children – focus on hygienic conditions, health services, diet or prenatal and postnatal follow-up. In other words, the measures provided for by the international texts taken into account by the Court are of a very different nature from that of the disputed provisions.

13. Under these conditions, it seems difficult to us to accept that prohibiting life imprisonment and providing for a maximum prison sentence of twenty years for women (see Article 57 of the Russian Criminal Code, mentioned in paragraph 16 of the judgment) constitutes a “special measure” intended to protect maternity within the meaning of Article 4, paragraph 2, of CEDAW. We can legitimately doubt this, as it is true that, even in the hypothesis of a twenty-year seclusion, the prospect of motherhood will most often be compromised. It is also significant that neither the majority nor the Constitutional Court explicitly qualifies the disputed difference in treatment as a “special measure” intended to protect maternity. To use the terms of the Russian High Court, the ban on life imprisonment provided for in favor of women would be justified more generally by their “social and physiological characteristics (...) on the basis of the principles of justice and humanism in criminal matters” (paragraph 18 of the judgment).

B) Statistical data

14. The second consideration put forward by the majority to consider that the disputed difference is justified concerns the statistical data presented by the Government, which indicate a considerable difference between the total number of men detained and the total number of women detained. The data in question also specifies that the number of people sentenced to life imprisonment is limited

(paragraph 48 of the judgment). Without wishing to evaluate these data and the reasons of a penological nature justifying treating men and women differently in this regard, the Court says it is prepared to admit that in the circumstances of the case the data in question and the elements mentioned above (taken international and European instruments examined above) provide a sufficient basis for concluding that there is a general interest justifying the exclusion of women from life imprisonment by a general rule (paragraph 82 of the judgment).

15. With all due respect to the majority, it does not seem to us that the considerations drawn from the statistical elements are “very strong” or “particularly solid and convincing” and can therefore justify a difference in treatment based on sex (paragraph 2 above). We observe, first of all, that statistical data concerns purely quantitative aspects. They say nothing about the possibility of women committing particularly serious crimes. Above all, they ignore the primordial importance of the personal situation of the offenders in determining a sentence. This approach to conceptualizing and individualizing legal treatment is, moreover, deeply integrated into the goals of contemporary feminism.

16. Furthermore, the two main trends illustrated by the above-mentioned statistical data – the male/female disproportion in the prison population and the small number of people sentenced to life imprisonment – are not unique to Russia. Indeed, the latest criminal statistics from the Council of Europe show that these two trends can be observed in all member states. More precisely, according to the statistics in question, women prisoners in Russia represent 8.2% of all prisoners in this country – a figure which corresponds approximately to the data provided by the Government – while the European average is 5% (Council of Europe, *Annual criminal statistics. Space I – prison populations,* doc. PC-CP (2015)7, 23 December 2015, p. 64). In other words, the disproportion invoked by the Government is even greater at the pan-European level than in Russia. Furthermore, regarding people sentenced to life imprisonment in relation to all prisoners, Council of Europe statistics show that the European average is of the order of 1.6% (ibidem, p. 97). Like Russia, this percentage reflects the small number of convicts belonging to this category. In these conditions, it does not seem to us that we can detect in these statistical elements any particularity of Russia which would constitute a strong argument to justify the disputed difference in treatment. In this regard, we recall that, once the existence of a difference in treatment has been demonstrated with regard to Article 14, it is up to the Government to prove that it was justified (see the recent judgment rendered in the case of *Biao v. Denmark* [GC], no. 38590/10, § 61, ECHR 2016).

C) The “disparity of approaches” at the European level

17. The third consideration tending to justify the disputed difference in treatment concerns “the disparity of approaches” observed in this area among the States parties to the Convention. In this vein, the majority notes that nine Contracting States have abolished life imprisonment, while other States provide for different age limits. With regard to women, some States exclude from life imprisonment women who are pregnant at the time of the commission of the offense or the imposition of the sentence, while others, including Russia, have extended this approach to all women. In these conditions, it would be appropriate to grant a “wide margin of appreciation” to the authorities of each State (paragraphs 83-85 of the judgment).

18. It is true that, according to the Court's case-law, a lack of common denominator in the domestic legal systems of the Contracting States leads, in principle, to recognizing a rather wide margin of appreciation for the benefit of the national authorities. In this case, there is no doubt that national legislators have a wide margin of appreciation on the question of whether or not to provide for the sentence of life imprisonment. States also have a significant margin of appreciation in determining which crimes would be punishable by such punishment, it being understood, however, that, in accordance with the principle of proportionality, only particularly serious crimes merit punishment. such sanction. On the other hand, when it comes to introducing differences between offenders placed in similar or comparable situations, as in this case women and men can be (paragraphs 66-68 of the judgment), the margin of appreciation narrows depending on the criterion of differentiation. We can never emphasize enough, in fact, that, in accordance with well-established case law of the Court, differences in treatment based exclusively on sex call for “very strong” considerations, “particularly solid and convincing reasons”, or even “ compelling reasons” to be justified (paragraph 2 above).

19. Furthermore, to answer the question of whether or not there is a commonality of views between the member States of the Council of Europe (or whether one can detect this or that trend), it is important to define precisely the subject in question and, therefore, the group of States which constitutes the point of reference. In other words, to answer this question, it would be necessary to compare what is truly comparable (see, *mutatis mutandis, Vallianatos and others,* cited above, §§ 26, 91). Mixing different elements would be likely to undermine methodological clarity and lead to hasty conclusions. In this case, what matters is whether it is justified to exclude women from the imposition of life imprisonment by a general rule. Therefore, the reference group is

that which is formed by the States which provide in their legislation for the penalty in question. However, we note that among the thirty-seven member states of the Council of Europe in which offenders can be sentenced to life imprisonment, only Albania, Azerbaijan and the Republic of Moldova (in addition to Russia) generally exclude in their criminal law the sentencing of women to this penalty (paragraphs 20 and 22 of the judgment). It thus appears that there is a large majority of States which do not exclude *women* from the imposition of life imprisonment by a general rule.

III. Final remarks

20. We have closely examined the reasons given by the majority to justify the disputed difference in treatment. It does not seem to us that the considerations in question – taken individually or even in combination – are sufficiently strong to constitute such a justification. We therefore consider that there has been a violation of Article 14 taken in conjunction with Article 5 of the Convention in this case.

21. That said, it is also important to clarify that this approach would not necessarily place the respondent State in the dilemma of either abolishing life imprisonment altogether or extending it to women. There are also other avenues which would involve a certain rearrangement of the sentence in question and the methods of its execution, and which would benefit both women and men. It should also be observed, finally, that the fact of providing for life imprisonment in the legislation does not mean that the judge does not have the possibility of taking into account in concreto the *particular* situation, including the vulnerability of this or that person, man or woman.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

Contents

I. Introduction (§§ 1-3)

1. The case of *Khamtokhu and Aksenchik v. Russia* once again forces the European Court of Human Rights ("the Court") to face the crucial question of life imprisonment, based on the 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 as it simultaneously raises complex questions relating to the implementation of positive discrimination policies in the light of conventional standards.

2. However, the majority did not consider it useful to look further into the specific modalities of the right not to be discriminated against in this case, thus missing the opportunity to clarify these fundamental principles. She also did not seize the opportunity offered to her to

develop the protection offered by the Convention by taking a decisive step towards the abolition of life imprisonment.

3. However, the examination of these two issues, to which this opinion is dedicated, makes it possible to highlight the existence of an inconsistency within the Russian policy of positive discrimination with regard to the perpetrators of certain offenses and the the incompatibility of the maintenance of life imprisonment by the Russian penal code with the Convention. For these two reasons, I cannot agree with 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 intend to call into question in any way the laudable and necessary nature of the political will to establish public policies for the protection of women, minors and the elderly. This is a fundamental postulate which must be recalled *ab initio* so that the following remarks are understood in their proper context. The fight against discrimination based on sex and age is an essential objective of public authorities and is firmly enshrined in international standards.

5. It is indeed indisputable that, even today, women constitute in certain respects a vulnerable group, and are subject to less favorable conditions than their male counterparts. Whether it is to protect their physical and moral integrity in the face of specific attacks or to ensure their equal access to education and employment, or any other aspect of economic, social and cultural life, State authorities have a duty to act in a concrete and effective manner to ensure real equality between men and women. In particular, prison systems rarely take into account the particular needs of women, notably in terms of classification and placement policies for prisoners, programs and services meeting their needs, sufficient presence of specialized staff and specific conditions, linked to health, hygiene and prenatal and postnatal care as well as the care of children living in prison.1 It is therefore not surprising that international instruments and

1. Penal Reform International and the Association for the Prevention of Torture state that "women face increased vulnerabilities and risks and, although the underlying causes of these vulnerabilities and risks are

the bodies responsible for ensuring their application are strongly involved in this process. The Court itself did not fail to recall that “progress towards gender equality is today an important goal of the Council of Europe ”2

6. Instruments for the protection of human rights of general scope, 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 based on sex. In addition, Article 6 § 5 of the ICCPR prohibits the imposition of the death penalty on a pregnant woman, as does Article 76 § 3 of Protocol No. 1 to the Geneva Convention of 1949. In the chapter of sectoral protection , the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) aims to prohibit discrimination against women in both the public and private spheres and notably requires States parties in its article 2 “to pursue by all appropriate means and without delay a policy tending to eliminate discrimination against women”. The United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) include provisions on the separation of women and special provisions for the conditions of detention of pregnant and lactating women, the prohibition of the use of solitary confinement and similar measures, the prohibition of the use of means of restraint on women during labor, childbirth or immediately after childbirth, as well as provisions on female personnel and access of male staff members in the female section (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 Prisoners and the Imposition of Non-custodial Measures for Women Offenders (Bangkok Rules) affirm the need to prioritize the imposition of non-custodial measures for women who come into contact with the system of criminal justice. Some of these rules specify how existing provisions of the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) apply to female prisoners and female offenders, while others address new issues relating to prison law.

Within the framework of Council of Europe law, it is appropriate to recall the brief references to the situation of women prisoners which appear

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often external to the material environment of detention, these are nonetheless significantly intensified in places of deprivation of liberty” (Penal *Reform International* et *Association for Prevention of Torture* (2013), *Women in Detention: a guide to gender-sensitive monitoring* http://tinyurl.com/PenalReform-wid-2013).

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

in Recommendation (2003)23 of the Committee of Ministers on the management by prison administrations of lifers and other long-term prisoners as well as in the European Prison Rules adopted by Recommendation Rec (2006)2 of the Committee of Ministers . Finally, as for European Union law, we should note the position taken by the European Parliament in its Resolution of March 13, 2008 on the particular needs of pregnant women and mothers in prison.

7. Thus, the necessity and legitimacy of the specific protection of the female population by public authorities and international bodies are beyond doubt. I have already expressed my conviction that "the full useful effect of the European Convention on Human Rights can only be achieved with a gendered interpretation and application, taking into account factual inequalities between men and women and the how they impact women's lives "3 . The following remarks cannot therefore be interpreted as a disavowal of this conviction.

8. However, and without minimizing the fundamental nature of the fight against discrimination suffered by women because of their sex, this protection must not serve as a pretext for perpetual victimization of women which would harm them and prove ineffective . *fine* counterproductive. One of the main pitfalls facing the protection of this category lies precisely in the maintenance of archaic prejudices concerning the nature or role of women within society. The perpetuation of such patterns can be just as dangerous as the social disadvantages that women may experience compared to men since they participate in them by maintaining the belief of an inherent difference in abilities between the sexes. To this end, CEDAW requires States Parties, in Article 5, to adopt the necessary measures with a view to "[m]odifying the patterns and models of socio-cultural behavior of men and women with a view to achieving elimination of prejudices and customary practices, or of any other type, which are based on the idea of the inferiority or superiority of one or the other sex or on a stereotypical role of men and women ".

9. The Court's case-law is unequivocal in this regard4 . In the case of *Ünal Tekeli v. Turkey,* regarding the extension of the husband's surname to his wife, she affirmed that "this tradition finds its origins in the primary role of the man and the secondary role of the woman in the family. However, progress towards gender equality in Council of Europe member states, including Turkey, and

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3. See my concurring opinion in the case of *Valiulienÿ v. Lithuania* (no. 33234/07, March 26, 2013.

4. See, in particular, *Burghartz v. Switzerland,* February 22, 1994, § 27, Series A no. 280-B, *Schuler-Zgraggen v. Switzerland,* June 24, 1993, § 67, series A no. 263.

particularly the importance attached to the principle of non-discrimination today prevents States from imposing this tradition on married women ”5

10. Similarly, in the *Konstantin Markin v. Russia,* regarding the refusal to grant parental leave to male soldiers, the Grand Chamber affirmed that "references to traditions, general presuppositions or majority social attitudes current in a given country are not sufficient to justify a difference in treatment based on the In this regard, the Court concluded that there had been a violation of Article 14 combined sex »6

with Article 8 of the Convention due to the difference in treatment between men and women on this basis. Furthermore, to the argument of the defendant government which intended to justify this measure by a “positive inequality” intended to compensate for the “factual” disadvantage of women in society, the Court responded that “this difference has the effect of perpetuating stereotypes linked to sex and constitutes a disadvantage ”7
also recalling that “States cannot justify the difference in treatment in question by invoking the traditions which prevail in a given country [nor] impose a traditional distribution of the sexes or stereotypes linked to sex” 8

11. It is therefore fundamental to emphasize that an unjustified differentiation between men and women, in the sense that it would not be based on a real factual disadvantage but on a preconceived idea of the supposed weaknesses of the latter compared to the former, would result not the reduction of inequalities but their maintenance, or even their worsening. It seems that the majority, in the present case, limited itself to a single aspect of the fight against discrimination without considering this specific problem in a global perspective.

B. Protection of minors and elderly persons in law international and European (§§ 12-17)

12. Taking into account their physiological and social characteristics, both young people and the elderly may, in certain circumstances, require specific protection from national authorities. This opinion does not in any way intend to call into question this essential objective of public policies, enshrined both in international law and in European human rights law.

13. Although the protection of minors is the subject of numerous international instruments, the reference text in this area remains the 1990 United Nations Convention on the Rights of the Child, including the Preamble

5. *Ünal Tekeli v. Turkey,* no. 29865/96, § 63 ECHR 2004-X (extracts).
6. *Konstantin Markin,* cited above, § 127.
7. *Ibid.,* § 141.
8. *Ibid.,* § 142.

recalls in particular that "the need to grant special protection to the child was set out in the 1924 Geneva Declaration on the Rights of the Child and in the Declaration of the Rights of the Child adopted by the General Assembly on November 20, 1959, and that it has been recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular articles 23 and 24), in the International Covenant on Economic Rights , social and cultural (in particular in Article 10) and in the relevant statutes and instruments of specialized agencies and international organizations concerned with the well-being of the child. 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 sanctions. against minors. Article 14 § 4 of the ICCPR identifies rehabilitation as the main interest of criminal justice for juveniles.

14. The detention of minors is therefore subject to specific rules, particularly through *soft law* instruments9 . Thus, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) of 1985, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) of 1990, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) of 1990, the Guidelines on Children in the Criminal Justice System recommended by the Economic and Social Council in its Resolution 1997/30 of 1997, the Guidance note from the United Nations Secretary-General: an approach to child justice (2008), the United Nations Guidelines for Alternative Care for Children (2009), and the Principles Concerning the Status and Operation of national institutions for the protection and promotion of human rights (Paris Principles) as well as, with regard to Council of Europe bodies, Recommendation of the Committee of Ministers of the Council of Europe R(87)20 on social reactions to juvenile delinquency, Recommendation Rec(2003)20 of the Committee of Ministers concerning new methods of dealing with juvenile delinquency and the role of juvenile justice, Recommendation Rec(2003)23 of the Committee of Ministers on the management by prison administrations of lifers and other long-term prisoners, Recommendation Rec(2008)11 of the Committee of Ministers on European Rules for juvenile offenders subject to sanctions or measures , Recommendation Rec(2009)10 of the Committee of Ministers on Council of Europe guidelines on national strategies

9. See, in this regard, my partly dissenting opinion, written jointly with Judges Popoviÿ and Karakaÿ, in the case of *Ertuÿ v. Turkey* (no. 37871/08, November 5, 2013).

Integrated Protection of Children against Violence and the Guidelines of the Committee of Ministers on child-friendly justice adopted on 17 November 2010, establish the standards that States must apply to these particular situations. There is no doubt that the detention of minors is subject to standards significantly different from those applicable to adults which relate either to substantive criminal law, or to procedural law, or to penitentiary law, or even to other areas. law. Rule 15 of the European Rules for Juvenile Offenders is symptomatic of this holistic vision, providing that "[a]ny judicial system dealing with cases involving minors must adopt a multidisciplinary and multi-institutional approach, and be part of the framework of larger-scale social initiatives intended for minors, in order to ensure them comprehensive and sustainable care (principles of community participation and continuity of care)".

15. As for life imprisonment of minors, article 37 (a) of the Convention on the Rights of the Child prohibits that "[n]o child shall be subjected to torture or to cruel, inhuman treatment or punishment or degrading. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons under eighteen years of age." *Soft law* instruments
are also clear in this regard. The United Nations General Assembly has been calling on States since 2008 to "[a]bolish, through legislation and in practice, the death penalty or life imprisonment without the possibility of release for persons who were under the age of 18 years old at the time of the commission of the act »10. In 2012, it again called on States "to ensure that, in their laws and practices, neither the death penalty, nor life imprisonment without the possibility of release, nor corporal punishment may be inflicted for crimes committed by persons under the age of 18, and (...) to consider repealing any other form of life imprisonment for crimes committed by persons under the age of 18"11 . In its General Comment No. 10, the Committee on the Rights of the Child observes that "it is likely that the imposition of a life sentence on a child will make it very difficult, if not impossible, to achieve the objectives of juvenile justice, despite even the possibility of release"; it "urges States parties to abolish all forms of life imprisonment for offenses committed by persons under the age of 18 "12

Finally, within the Council of Europe, Recommendation Rec(2003)23 of the Committee of Ministers refers, with regard to the regime and

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

planning of sentences for minors, with the principles enshrined in the aforementioned United Nations Convention (paragraph 32).

16. International law also provides, although to a lesser extent, instruments for the protection of older persons. Although international authorities have become aware of the phenomenon of aging of the world population and the specific problems it generates13, there is currently no sectoral convention dedicated to the protection of this part of the population. population. Certain texts of general scope, with binding force, prohibit discrimination linked to age and in this sense offer protection to elderly people, like Article 21, paragraph 1, of the Charter of Fundamental Rights of the European Union and Article 1 of the International Convention for the Protection of All Migrant Workers and Members of Their Families. CEDAW, for its part, refers, in subparagraph e) of the first paragraph of its article 11, to retirement and old-age benefits which directly concern this group. Finally, the Convention on Persons with Disabilities, in its article 25 § b), urges States to provide, among other things, “services designed to minimize or prevent new disabilities, particularly among children and the elderly” and calls, in its article 28 § 2 b), to ensure “persons with disabilities, in particular women and girls and the elderly, access to social protection programs and poverty reduction programs”.

Soft law instruments

provide more comprehensive sectoral protection. The Vienna Plan of Action on Aging of 1982 and the Madrid Plan of Action on Aging of 2002, the United Nations Principles for Older Persons adopted in 1991 in General Assembly Resolution 46/91 or The 2002 Toronto Declaration on the global prevention of elder abuse (World Health Organization) is particularly dedicated to specific issues related to aging. Among the instruments offering specific protection to older persons, ILO Recommendations R162 on older workers14 and R131 concerning disability, old age and survivors' benefits15, General Comments No. 6 on economic rights, social and cultural rights of older persons16 and 20 on non-discrimination in the exercise of economic, social and cultural rights17 of the Committee on Economic, Social and Cultural Rights or n General Recommendation No. 27 on older women

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 aging, July 22, 2011, A/66/173.
14. Adopted in Geneva on June 23, 1990.
15. Adopted in Geneva on June 29, 1967.
16. December 8, 1995, E/1996/22.
17. July 2, 2009, E/C.12/GC/20.

and the protection of their human rights of the Committee on the Elimination of All Forms of Discrimination against Women18 .

17. Among the instruments establishing standards for detention, some take into consideration the specific situation of elderly people19. This is the case, for example, of Principle No. 5 of the United Nations Body of Principles for the Protection of All Persons Subject to Any Form of Detention or Imprisonment, adopted by the General Assembly in its resolution 43/ 173 of December 9, 1988, which recommends that "measures applied in accordance with the law and intended exclusively to protect the rights and the particular condition of women, especially pregnant women and mothers of young children, children, adolescents and elderly, sick or disabled persons are not deemed to be discriminatory measures." Similarly, Recommendation Rec(2003)23 of the Committee of Ministers of the Council of Europe relating to the management by prison administrations of life prisoners and other long-term prisoners indicates in particular in paragraph 28 that "[i "Elderly prisoners should be helped to maintain good physical and mental health." However, if specific provisions exist regarding the adjustment of the conditions of detention of elderly people taking into account their specific needs, particularly in medical matters, nothing in international law indicates that they must benefit from a special legal regime. material criminal offence, particularly at the sentencing stage.

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

A. L'obligation de discrimination positive (§§ 18-21)

18. The prohibition of discrimination formulated by the Convention finds its source in the concept of equality. Article 14 formally establishes the equality of citizens by stating that "[t]he enjoyment of the rights and freedoms recognized in this Convention must be ensured, without distinction of any kind, based in particular on sex, race, color, language, religion, political opinions or any other opinions, national or social origin, membership of a national minority, property, birth or any other situation". The Court has never deviated from the principle according to which this article "protects individuals placed in similar situations against any discrimination "20 . Even more, the search for

18. December 16, 2010, CEDAW/C/GC/27.

19. On this subject, see the edifying report by Human Rights Watch, " *Old behind bars: the aging prison population in the United States* ", 2012, and the study by Tourat and Désesquelles, La prison face au agricole, 2016 (http://www.gip-recherche-justice.fr/).

equality in the application of protected rights is so significant that it considered that “[e]verything happens as if Article 14 was an integral part of each of the provisions guaranteeing rights and freedoms”21 . There is therefore no room for doubting the central place occupied by the promotion of equality within the European system for the protection of human rights.
I have already had the opportunity to underline the importance of this “general principle of equality” in the case of *Legal Resource Center in the name of Valentin Câmpeanu v. Romania,* and to underline the extent to which it permeates the entire European system for the protection of human rights22 .

19. However, the concept of equality is complex in terms of its implementation to the extent that it is broken down, empirically, into two distinct parts. The first consists of legally guaranteeing the same rights to all citizens. It is therefore a purely “formal” equality since it does not take into account the pre-existing situation. The second, “real” part of the principle of equality seeks to compensate for this deficiency by aiming for the factual equality of individuals. It is therefore a question of compensating for initial inequalities to *ultimately* result in equal situations notwithstanding the original divergences in each person's situation.

Equality here joins the justice of Aristotelian thought. The concept of real equality then refers to the idea of "distributive" justice, since the application of equal treatment to people in unequal situations would be fundamentally unjust: people in unequal situations must be treated unequally to restore equality. It is therefore sometimes necessary, for the objective of equality to be achieved, to introduce a form of inequality. This is what the Court has already clearly established on the occasion of *the Belgian linguistic case,* on the occasion of which it stated that “certain legal inequalities only tend to correct factual inequalities »23

20. This is precisely the objective of positive discrimination policies: to break formal equality to achieve real equality for the people concerned, through temporary measures with the objective of creating equality of opportunity or treatment. Once this equality is assured, temporary measures lose their legitimacy24. It is then in the name of non-discrimination that a difference in treatment is required or,

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20. *Marckx v. Belgium,* June 13, 1979, § 32, series A no. 31.
21. *Ibid.*
22. See my opinion (§ 9) in the case *Legal Resource Center in the name of Valentin Câmpeanu v. Romania* ([GC], no. 47848/08, ECHR 2014).
23. *Case “relating to certain aspects of the linguistic regime of education in Belgium ”* (merits), July 23, 1968, § 10, series A no. 6.
24. General Recommendation No. 25 concerning paragraph 4 of CEDAW regarding women relating to temporary special measures, United Nations doc. A/59/38 (part 1), annex 1); and General Comment 18, article 26: Principle of equality, UN
Doc. HRI/GEN/1/Rev.1 (1994), § 10 ; *The Equal Rights Trust Declaration of Principles on Equality,* 2008, *Principle* 3.

as Kelsen summarizes, “if individuals are equal, more precisely if individuals and external circumstances are equal, they must receive equal treatment, if individuals and external circumstances are unequal, they must receive different treatment”25 . Such action is compatible with the Convention, as expressly provided for in the Preamble to Additional Protocol No. 1226. The Court recently affirmed this again in the case of *Andrle v. Czech Republic,* in which it states that “[a]rticle 14 does not prohibit a Member State from treating groups differently to correct “factual inequalities” between them; in fact, in certain circumstances, the absence of differential treatment to correct an inequality may in itself entail a violation of the provision in question ”27

21. However, even in these cases, the Convention requires that the difference in treatment be justified by objective and reasonable grounds, and proportionate to the legitimate aim pursued. The Court made this clear in *Stec and others v. United Kingdom28 ,* precisely in the face of positive discrimination alleged by the respondent State to restore equality between the sexes. She recalled on this occasion that despite the possibility, or even the necessity, of implementing such differentiation policies in certain cases, "a distinction is discriminatory within the meaning of Article 14 if it lacks objective justification and reasonable, that is to say if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means used and the aim pursued ”29

. Furthermore, she specified that “only very strong considerations can lead the Court to consider a difference in treatment based exclusively on sex compatible with the Convention ”30. The Court has already admitted that age is a concept which is also covered by Article 1431 and which must be taken into consideration when determining the sentence32. Consequently, differences in treatment motivated by a concern to reestablish real equality between citizens of public authorities do not escape the classic control carried out by the Court.

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25. Hans KELSEN, “Justice and natural law”, Natural law - Annals of political philosophy, vol. III, 1959, p. 50.
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 to promote full and effective equality, provided that they meet an objective and reasonable justification”

27. *Andrle v. Czech Republic,* (no. 6268/08, § 48, February 17, 2011.
28 . *Stec and others v. United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.
29. *Stec and others v. United Kingdom* ([GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI).

30. *Ibid.,* §52.
31. *Schwizgebel v. Switzerland,* no. 25762/07, § 85, ECHR 2010 (extracts), and *Solis v. Peru,* Human Rights Committee, communication No. 1016/2001, UN
Doc. CCPR/C/86/D/1016/2011, § 6.3.
32. *Farbtuhs c. Latvia* (after 4672/02, 2 December 2004).

Any differential treatment of people placed in similar situations must therefore satisfy the conditions of objectivity, reasonableness, proportionality and legitimacy.

B. The obligation of “levelling up” in the case of a “false” positive discrimination (§§ 22-24)

22. Otherwise, positive discrimination treatment becomes a privilege, inadmissible before the Convention. When the factual conditions for treating a category of people more favorably are not present, positive discrimination is no longer justified and the Convention imposes on the State a positive obligation to extend favorable treatment to those who did not benefit from it. until there. This is what I have already explained in my opinion in the *Vallianatos et al. Greece,* on the occasion of which I indicated that "[i]f the national courts were to limit themselves to declaring the discriminatory provision contrary to the Constitution or the Convention without being able to extend the special favorable regulation to the "individual who suffers discrimination, the violation of the principle of equality would persist and the judicial protection sought would be devoid of any real content "33. This is the fundamental consequence of a finding of violation of the principle of equality by the Court, as demonstrated from the outset by its case law, for example in the case of *Marckx v. Belgium.* In this judgment, it indicates in fact, after having noted the existence of discrimination against children born out of wedlock in matters of inheritance, that it "does not exclude that a judgment finding a violation of the Convention on any of them could make legislative reform desirable or necessary ”34. In the *Vallianatos case,* the Grand Chamber further stated that “[t]he notion of discrimination within the meaning of Article 14 also includes cases in which an individual or group is, without adequate justification, treated less well. than another, even if the Convention does not require more favorable treatment ”35

23. A finding of violation of Article 14 due to the difference in treatment of similar groups without objective and reasonable justification can only give rise to one method of redress: leveling “from the top”, that is- i.e. an extension of the most favorable treatment to all

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33. *Vallianatos and others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts)
In my opinion in the *Konstantin Markin affair,* I had already written: "A leveling down of the parental situation of female soldiers, which would bring their situation into line with that currently experienced by their male counterparts, would not only decrease significantly abusive the level of social protection conferred on women who serve in the army but would also unjustifiably put military personnel in a less favorable legal situation than civilians. »

34. *Marckx v. Belgium,* June 13, 1979, § 42, series A no. 31.
35. *Vallianatos and others,* cited above, § 76.

people in a similar situation. Leveling down “to the bottom”, that is to say the withdrawal of preferential treatment from those who previously benefited from it, is not admissible from the point of view of the Convention. The achievements in terms of human rights cannot indeed be brushed aside. The Preamble to the Convention itself establishes an objective of safeguarding and “developing” human rights and fundamental freedoms. It is clear in this regard that European protection aims to advance these rights, and prohibits their discretionary reduction based on political considerations36. Furthermore, 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 interpretative result would be manifestly absurd (Article 32(b) of the Vienna Convention on the Law of Treaties).

24. In this regard, the good example came from Greece in the *Vallianatos case,* with the decision of the Greek Parliament of December 23, 2015 to remove the unjustified difference in treatment from its legislation and to extend the registered partnership regime to partners of the same sex, following the Court's judgment. The bad example is that of the United Kingdom in the *Abdulaziz, Cabales and Balkandali case,* in which the British state redressed the violation by granting residency rights to the applicants' spouses, but then leveled "down" by removing the possibility of family reunification37. Such a method of implementing the Court's judgment, while respecting the express violation of equal treatment, is in flagrant contradiction with the very spirit of the judgment.

Second Part (§§ 25-49)

IV. The incompatibility of life imprisonment with the law international (§§ 25-38)

A. The penological objectives of criminal imprisonment (§§ 25-31)

25. If the recognition that “real” life imprisonment amounts to inhuman treatment38 constitutes an incontestable step forward, the Court must take note of the need to purely and simply go beyond this archaic punishment. The *Khamtoku and Aksenchik* affair offered him this

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

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

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

opportunity, which the majority unfortunately refused to seize. However, taking into consideration the penological objectives of criminal imprisonment, the international trend in favor of the abolition of this type of sanction and the requirement for an evolving and pro persona reading of the Convention should have led *to* a different conclusion in view of the facts of the case.

26. Within a democratic society, the imposition of a custodial sentence, taking into account the seriousness of such treatment, is only pronounced in the most serious cases and must be subject to supervision. strict. It no longer aims only at the punishment of the guilty but takes on multiple social functions. This is the choice that democratic states, respectful of human rights, have made, going beyond the retrograde concept of purely repressive justice. The six purposes that can be pursued by the criminal sanction of sane offenders are the following: 1) special positive prevention (social reintegration of the perpetrator); 2) special negative prevention (neutralization of the perpetrator to prevent future offenses by keeping him away from society); 3) general positive prevention (reinforcement of the violated rule by strengthening the acceptance and respect by society of the violated rule); 4) general negative prevention (dissuading potential perpetrators from engaging in future violations of the rule); 5) punishment (expiation of the perpetrator for the act committed); and 6) reparation for the victim39 .

27. However, life imprisonment annihilates any prospect of social reintegration. As such, it purely and simply excludes one of the fundamental objectives of criminal sanction and retains only the punishment of the perpetrator and general prevention. Such a view is in inherent contradiction with the protection of human rights. The Court has already noted this in the *Vinter and Others v. United Kingdom.* On this occasion, the judges observed that “if punishment remains one of the purposes of incarceration, penal policies in Europe now emphasize the reintegration objective of detention” 40. On this basis, the Court concluded that “real” life imprisonment disregards the requirements of Article 3 of the Convention. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”), in one of its latest reports, recalled “that incarcerating a person for life without any real hope of release constitutes , from his point of view, inhuman treatment ”41. Therefore, placing a person in detention until the end of their days, however atrocious their crime may have been, undoubtedly constitutes treatment

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39. I have already identified them 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, CEDH 2015).

40. *Vinter and others,* cited above, §115.

41. CPT, 25th CPT general report, April 2016, CPT/Inf (2015) 10 part, §73.

inhuman since it destroys any hope of rehabilitation. Worse still, the message conveyed by this type of sanction assimilates the inmate to a dangerous monster, forever excluded from society, who “deserves” to languish in prison for the rest of his life without further consideration. This type of reasoning amounts, from a moral point of view, to denying the very humanity of these people, since it makes a distinction between prisoners who are "worth" being reintegrated and those considered as " lost causes.”

28. The argument that life imprisonment as it is applied today in Europe offers possibilities for parole actually tilts the scales even more towards abolition. Indeed, what interest could there be in maintaining a sentence which would not be effectively applied and systematically transformed into classic criminal imprisonment for a variable duration? On the contrary, the definitive abolition of this sentence would guarantee everyone the certainty that the prospect of a lifetime of seclusion is no longer possible and that the objective of social reintegration is within the reach of all prisoners. Furthermore, it would ensure the effectiveness of procedures for individualization and periodic review of sentences which, although they are sometimes complex to put in place, are nevertheless essential to respect the fundamental rights of everyone.

29. Even from a strictly pragmatic perspective, life imprisonment does not bring any added value in terms of the effectiveness of the criminal sanction. I have already emphasized that no correlation can be demonstrated between the existence of the life sentence and the reduction in the rate of commission of the most serious crimes. On the contrary, certain states which have maintained this sanction in their criminal arsenal, like the United States or Russia, are experiencing significant crime rates. On the other hand, certain states having abolished it, such as Portugal since the prison reform of 188442, do not experience either general crime rates or particularly high violent crime rates43. Therefore, the last tenable argument in favor of life imprisonment, which would consist of seeking its benefits in terms of general prevention, can no longer justify the maintenance of this type of inhuman treatment in our time. Thus, life imprisonment finds no justification with regard to the penological objectives of criminal imprisonment or even in terms of the effectiveness of prevention. The Court had to take note of this observation and adopt an appropriate reading of the Convention accordingly.

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42. Voir 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 statistical data from the Council of Europe, Annual criminal statistics, Space I – prison populations, doc. PC-CP (2015)7, December 23, 2015.

30. Furthermore, and even though the determination of the sentences imposed is in principle a matter for the national authorities, the Court has firmly established in its case-law that this discretion is not unlimited. She stated in the case of *Nikolova and Velichkova v. Bulgaria* that “[c]ertainly, it is not for the Court to rule on the degree of culpability of the person in question, or to determine the sentence to be imposed, these matters falling within the exclusive jurisdiction of the domestic criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention guarantees rights not theoretical or illusory, but concrete and effective, the Court must ensure that the State fulfills its duties as required. owes its obligation to protect the rights of persons within its jurisdiction ”44. It is therefore up to the Court to exercise adequate control in this matter.

31. Questions that are so fundamental to the physical and moral integrity of the human person, at the heart of the hard core of the European protection of human rights, cannot be left to the discretion of each State, under penalty of being reduced to nullifying the efforts made to guarantee concrete and effective protection of human rights in Europe. The granting of a margin of appreciation with regard to the appropriate length of prison sentences for criminal offenses is not admissible, having regard to the absolute nature of the right at issue, namely the prohibition of 'inhumane treatment by the state. It therefore seems incomprehensible that the majority supported in paragraph 81 of the judgment the compatibility of the sentence of life imprisonment in the Russian legal framework with Article 3 of the Convention, putting in the background the margin of appreciation of the Russian state45. This condescension actually seems particularly inappropriate for the Russian Federation, where the Court has repeatedly found a widespread problem of inhumane and degrading prison conditions.

B. The requirement for an evolving and *pro persona* reading of rights guaranteed by the Convention (§§ 32-38)

32. Apart from the fact that life imprisonment does not correspond to the purposes of the criminal sanction, it tends to be excluded in certain national penal systems, which illustrates the emergence of an international trend in favor of the abolition of this type of punishment. In Europe, in addition to Portugal, Andorra (articles 35 and 58 of the penal code), Bosnia and Herzegovina (article 42 of the penal code), Croatia (articles 44 and 51 of the penal code), Montenegro (article 33 of the penal code), San Marino (article 81 of the code

44. *Nikolova et Velichkova c. Bulgarie,* n° 7888/03, § 61, 20 December 2007.
45. Article 3 is also cited in paragraph 71 and the “ample” margin of appreciation in paragraphs 85 and 87 of the judgment.

penal), and Serbia (article 45 of the penal code) do not apply life imprisonment46. Beyond European borders, other states do the same, like Angola (article 66 of the Constitution), Brazil (article 5, XVVII, of the Constitution), Bolivia (article 27 of the Penal Code), Cape Verde (article 32 of the Constitution), China (article 41 of the Penal Code of the Autonomous Region of Macao), Colombia (article 34 of the Constitution), Costa Rica (article 51 of the Penal Code), the Dominican Republic (article 7 of the Penal Code), East Timor (article 32 of the Constitution), Ecuador (articles 51 and 53 of the Penal Code), El Salvador (article 45 of the Penal Code criminal), Guatemala (article 44 of the penal code), Honduras (article 39 of the penal code), Mexico (article 25 of the federal penal code), Mozambique (article 61 of the Constitution), Nicaragua (article 52 of the penal code), Panama (article 52 of the penal code), Paraguay (article 38 of the penal code), Sao Tome and Principe (article 37 of the Constitution), Uruguay (article 68 of the penal code) and Venezuela (article 44 (3) of the Constitution). However, none of these systems has collapsed or experienced a particular increase in criminal acts, demonstrating *de facto* the existence of an abolitionist movement and the unnecessary nature of this type of sanction within a society. democratic. The Court is itself aware of this trend, since it notably indicated in the *Vinter* case that "European law and international law today clearly support the principle that all detainees, including those serving life sentences, are offered the opportunity to mend their ways, and the prospect of being released if they succeed ”47. The judges also took care to note that “the practice of the Contracting States reflects this desire both to work for the reintegration of life sentence prisoners and to offer them a prospect of release” 48

33. However, one of the cardinal principles of the interpretation of the 1950 conventional text is that of an evolving interpretation of the guaranteed rights. Since the *Tyrer v. United Kingdom,* the Court constantly reaffirms the leitmotif according to which “the Convention is a living instrument”, the interpretation of which must take into account the evolution of standards at the national and international level49. In this case, the Attorney General for the Isle of Man argued that "with due regard to the local situation on the island", the continued use of corporal punishment was justified as a deterrent. However, for the Court "the vast majority of member States of the Council of Europe appear to ignore them and, for

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

47. *Vinter and others,* cited above, §114.
48. *Ibid.,* § 117.
49. *Tyrer v. United Kingdom,* n°5856/72, § 31, April 25, 1978.

some of them have never known them in our time; (...) This at least allows us to doubt that the maintenance of order in a European country requires the possibility of inflicting such a punishment. It concluded that the Isle of Man should be considered as fully sharing this “common heritage of political ideals and traditions, respect for freedom and the rule of law” to which the Preamble of the Convention refers, and that consequently, local necessities cannot modify the application of Article 3. Consequently, the evolving interpretation is closely linked to a consensual reading of the text and to taking into consideration the practice of the “vast majority” of States parties. , considered the indicator par excellence of “current living conditions”, the evolution of which since the drafting of the Convention justifies such an interpretation.50

34. Such a consensual and evolving reading is consistent with the rules of interpretation of international law. In the *Russian Indemnities case,* the Permanent Court of Arbitration recalled that “the execution of commitments is, between States and between individuals, the surest comment on the meaning of these commitments ”51. The subsequent practice of the parties in the execution of a treaty is therefore a fundamental interpretative tool, capable of enlightening the interpreter as to the way in which the agreement should be understood. It is therefore logical that it appears among the means listed in Article 31 of the Vienna Convention. This is a classic interpretive technique of international law, recognized by almost all international courts52. The International Court of Justice has long examined this subsequent practice in interpreting the provisions of a treaty53 and in particular it clearly indicated in the case between Costa Rica and Nicaragua concerning a *dispute relating to human rights*

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50. See my opinion in *Muršiÿ v. Croatia* ([GC], no. 7334/13, October 20, 2016).

51. Russian indemnity case *(Russia v. Turkey),* arbitral award of November 11, 1912, RSA, 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 SP Anastasiou (Pissouri) Ltd and others,* Aff. C-432/92, July 5, 1994, Rec. 1994 I-03087, § 42; WTO DSB Appellate Body, Japan – Tax on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of October 4, 1996 , Section E; CIDH, *Claude-Reyes et al. vs. Chile,* judgment of September 19, 2006 (Merits, Reparations and Costs), Series C n°151, §78; CDH, General Comment No. 22 (article 18), September 27, 1993, CCPD/C/21/Rev.1/Add.4, §11.

53. See, for example, ICJ, *Kasikili/ Sedudu Island (Botwana/ Namibia),* judgment of December 13, 1999, Rec. 1999, § 50; ICJ, *Territorial dispute (Libyan Arab Jamahiriya/ Chad),* judgment of February 3, 1994, Rec. 1994, §§66-71; ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* jurisdiction and admissibility, judgment of November 26, 1984, Rec. 1984,§§36-47; Certain expenditures of the United Nations (Article 17, paragraph 2, of the Charter), (Article 17, paragraph 2, of the Charter), advisory opinion of July 20, 1962, Rec. 1962, p. 160-161.

navigation and related rights that “taking into account the subsequent practice of the parties, within the meaning of Article 31-3-b) of the Vienna Convention, may lead to a departure from the original intention on the basis of a tacit agreement between the parties ”54. In its classic sense, subsequent practice is therefore understood from a perspective centered on the State, as Sir Gerald Fitzmaurice had already underlined by indicating that such practice is, according to him, only characterized "when it is possible and reasonable to infer from the conduct of the parties that they considered their interpretation of the instrument in question to be legally correct and that they tacitly recognized themselves as bound accordingly by a certain way of acting”55 . The fact remains that the argument based on the existence of a European consensus is consistent with this traditional rule, the central nature of which within the European system is reinforced by the wording of the Preamble recalled above. In the *Loizidou v. Turkey,* the Court reiterates its attachment to respect for the rules of interpretation formulated in the Vienna Convention of 1969, and more particularly to the "practice subsequently followed in the application of the treaty by which the agreement of the parties to the treaty is established regard to the interpretation of the treaty ”56. On this occasion, it formalizes the link between subsequent practice and the consensus observable between the States parties by considering that, "as for the subsequent practice of the treaties, if declarations go against the Turkish interpretation of articles 25 and 46 , a practice reflecting a consensus among all Contracting Parties regarding the attachment of conditions to instruments of acceptance would not have been established ”57. This means has, in essence, an important evolutionary dimension in that the practice of States and non-State actors modifies throughout the execution of the treaty, adapting to changes in morals and new social realities. It is therefore for the European Court the index par excellence of the state of current li

35. But beyond a conception of consensus strictly centered on the State, the very nature of the legal order of the Council of Europe allows the Court to considerably broaden this notion. The Council indeed embodies in this context the vision of a deliberative international democracy, in which the majority or a representative proportion of the States parties to the Convention are considered to speak in the name of all and thus empowered to impose their will on others. parts58. It is no longer a question

54. ICJ., *Dispute relating to navigation rights and related rights (Costa Rica v. Nicaragua),* judgment, ICJ Reports 2009, §64.
55. Separate opinion of Judge Gerald Fitzmaurice, ICJ, *Certain Expenditures of the United Nations* (Article 17, paragraph 2, of the Charter), (Article 17, paragraph 2, of the Charter), advisory opinion of July 20, 1962, Rec. 1962, p. 201.
56. *Loizidou v. Turkey* (preliminary objections), no. 15318/89, § 73, March 23, 1995.
57. *Ibid.,* § 67.
58. See, especially, paragraphs 20 to 22 of my opinion in the *Muršiÿ* case (cited above).

only to take into consideration the unanimous expressions of the will of the States parties to the Convention, but a multitude of indicators emanating from a plurality of actors. It is no longer a *Lotus59 type mechanism,* centered on the State, narrowly bilateral, exclusively voluntarist and *top-down,* but a democratic type normative creation mechanism, centered on the individual, largely multilateral , resolutely consensual and *bottom-up* which involves European and other non-European States as well as non-state actors. From this “deformalization” of the sources of European law arise in particular the fundamental role of *soft law60* within the normative system of the Council of Europe, but also the particular characteristics of the content of the consensus likely to guide the Court in its interpretation of the Convention.

36. Indeed, the Court is thus entitled to adopt a relatively broad and flexible conception of the content of the European consensus. On certain occasions, it was able to take satisfaction from emerging trends or a consensus in the process of becoming a reality to initiate an evolving interpretation of the Convention. In the case of *Christine Goodwin v. United Kingdom* for example, even though it notes "the absence of a common European approach "61 regarding the way of understanding the legal consequences of sex change, it affirms that it "attaches [...] less emphasis on the absence of evidence of a European consensus on how to resolve legal and practical problems than on the existence of clear and uncontested evidence of a continuing international trend not only towards increased social acceptance of transsexuals but also towards the legal recognition of the new sexual identity of transsexuals who have undergone surgery ”62. Finally, the Court forcefully recognized the indispensable nature of such a reading of the Convention. She notably recalled on the occasion of the case of *Stafford v. United Kingdom* that “[i]t is of crucial importance that the Convention is interpreted and applied in a way which makes its rights practical and effective and not theoretical and illusory. If the Court were to fail to maintain a dynamic and evolving approach, such an attitude would risk obstructing any reform or improvement ”63

37. Another cardinal interpretative principle, closely linked to evolving and consensual interpretation, and whose application should have been considered by the Grand Chamber, is that of a *pro persona* reading of the

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59. 1927 PCIJ, series A no 10, p. 18: “The rules of law binding States therefore proceed from their will.”

60. See on this subject my opinion in the *Muršiÿ* case (cited above).

61. *Christine Goodwin v. United Kingdom* [GC], no. 28957/95, § 85, July 11, 2002.

62. *Ibid.*

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

guaranteed rights. The Statute of the Council of Europe indeed establishes among its objectives the achievement of “a closer union between its Members in order to safeguard and promote the ideals and principles which are their common heritage and to promote their economic and social progress ". To do this, emphasis is placed on “the conclusion of agreements and (...) the adoption of common action” in all relevant aspects of social life (economic, social, cultural, scientific, legal, administrative) and “the safeguarding and development of human rights and fundamental freedoms”. By thus proclaiming the primacy of human rights among the objectives of the Council of Europe, the Statute opens the way to the *pro persona principle,* placing the individual at the center of concerns.
Such a conception of European texts leads to favoring the interpretation most favorable to the individual and their rights, in accordance with the principle of the useful effect of protected rights64 .

38. However, by focusing solely on the retributive and dissuasive aspects of the criminal sanction and by omitting the individualization and progressiveness of the sentence, the Court is moving in the present case towards a strictly pro auctoritas approach to criminal *imprisonment . .* Ultimately, the Grand Chamber should have continued the development initiated in the *Vinter case,* in which it admitted the incompatibility with Article 3 of the Convention of "real" perpetuity, and extended its reasoning to the very principle of life imprisonment. Such an interpretation of Article 3, in accordance with the international trend in favor of the abolition of this type of penalty, would have been in line with the principles of evolving and *pro persona* interpretation of the Convention. The example of the abolition of the death penalty, ratified both by the adoption of Protocols 6 and 13 and by case law65, clearly illustrates that punishments once considered normal can, with time and the progression of European societies, become intolerable.

V. The application of conventional norms to the species (§§ 39-49)

A. The inconsistency of the less favorable treatment of the majority group of men aged 18 to 65 (§§ 39-46)

39. By refusing to consider that the applicants suffered discrimination due to their sentencing to life imprisonment, the majority adopted an erroneous analysis of the facts of the case. In fact, it was not a question here of evaluating the legitimacy of the protection of women, minors and the elderly, but of controlling the

64. See my opinion in the *Muršiÿ* case (cited above), § 21.
65. See, e.g., ECHR, *Al-Saadoon and Mufdhi c. United Kingdom,* No. 61498/08, §§ 119 et seq., 4 October 2010.

compatibility with the Convention of the treatment inflicted on men aged 18 to 65.

40. The justification put forward by the Government in support of the difference in treatment between men and women with regard to life imprisonment was based, in its own words, on “their special role in society linked, above all, to their reproductive function ” 66. However, such an argument, accepted by the majority as “a general interest justifying the exclusion of women ”67, arises precisely from social stereotypes based on sex and a paternalistic attitude already condemned in the *Konstantin Markin affair.* However, even though the justification put forward by the respondent State was the same, the Court made an about-face in the present case and this time accepted, without further explanation, this argument. In short, the factual inequality that the “positive measures” undertaken by the Government supposedly aim to correct is only the reflection of a reductive and archaic vision of women in Russian society.

41. Thus, the Government's reference to the promotion of “positive inequalities ”68 is irrelevant and incompatible with the meaning given to the notion of positive discrimination in international law, because the penal measure adopted in the contested provision of the penal code Russian law for the benefit of women is not a temporary measure aimed at creating equality of opportunity or treatment, but is based on the sexist social prejudice of the legislator69. In other words, the binding text of Article 4 of CEDAW does not apply to the present case. Furthermore, the Government's argument is in no way supported by the various *soft law* instruments cited. These instruments target conditions of detention and the protection of women's roles in reproduction and child care and must be distinguished from broader measures, such as that set out in Russian criminal law, which aim to protect women in generally because of their sex. It should further be borne in mind that the alternative to life imprisonment under the Russian Criminal Code is a prison sentence of twenty-five years. If sentenced to twenty-five years of imprisonment, the inmate is eligible for parole only after sixteen years. The exclusion based on sex from life imprisonment provided for by Article 57 of the Russian Criminal Code does not in itself make it possible to achieve the declared goal of protecting pregnant women and mothers of young children, since at the moment

66. Paragraph 47 of the judgment.

67. Paragraph 82 of the judgment.

68. Paragraph 46 of the judgment.

69. See, in this regard, *Karlheinz Schmidt v. Germany,* no. 13580/88, § 28, July 18, 1994, and *Emel Boyraz v. Turkey,* no. 61960/08, § 52, December 2, 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, February 25, 2016).

they will be eligible for parole; their children will already be in their late teens. Without claiming that motherhood should not benefit from specific protection within modern societies, the stereotypical message conveyed here is that of female weakness compared to male endurance and cannot, therefore, constitute a legitimate reason for nature to justify a difference in treatment.

42. The Court nevertheless reiterates the principles that it usually applies in matters of differences in treatment based on sex.

It clearly recalls that they "must be justified by particularly serious reasons, and that references to traditions, general presuppositions or majority social attitudes current in a given country cannot in themselves be considered to constitute sufficient justification for the difference in treatment in question, any more than can stereotypes of the same order based on race, origin, color or sexual orientation "70. Therefore, the conclusion set out in paragraph 82 of the judgment that the low number of female prisoners and the need to protect pregnant women and mothers constitute sufficient justification for the exclusion of this group from life imprisonment is in flagrant contradiction with the stated principles.

43. The same applies to the difference in treatment of elderly people. No justification for more favorable treatment of this group exists in international law with respect to sentencing, as I noted above. The judgment itself provides no legal basis for this distinction. The Government limits itself to considering that the pronouncement of life imprisonment for people over 65 would make the prospects of early release illusory71. This is the argument taken up by the majority in this judgment72, without it being possible to detect the reasons for determining the age from which life imprisonment becomes intolerable for reasons of humanity and justice. On the contrary, the average life expectancy of a man at birth in Russia being 64.7 years73 and given the deplorable conditions prevailing in penitentiary establishments in Russia74, which must further reduce the life expectancy of prisoners, it is questionable to arbitrarily set the limitation of this type of sentence at 65 years in relation to other prisoners, because a life sentence at the age of 50 or 65 has an effect

70. Paragraph 78 of the judgment.

71. Paragraph 44 of the judgment.

72. Paragraph 81 of the judgment.

73. According to the most recent statistics from the World Health Organization.
Life expectancy at age 60 for men is 76.3 years.

74. See the leading judgment on the matter *Ananyev and others v. Russia* (nos. 42525/07 and 60800/08, January 10, 2012), and, specifically with regard to conditions of detention after conviction, *Burko v. Russia* (No. 32036/10, 12 November 2015).

practically identical to making the possibility of early release illusory. In addition, it is difficult to distinguish between a person sentenced to imprisonment at the age of 50 who would not be eligible for parole before age 75 and another person who would be sentenced to a prison term. from 15 years old to the age of 64, with the possibility of applying for parole after 10 years. The two inmates would only be eligible for parole if they live longer than the average Russian man. Therefore, the justification for differential treatment cannot be considered objective, reasonable and legitimate.

44. Furthermore, from my point of view, the statistical data put forward by the Government to illustrate this state of affairs prove to be incomplete and insufficient to demonstrate the validity of the difference in treatment between men and women, further reinforcing the feeling of inconsistency that emerges from this judgment. Indeed, the Court invited the Government to produce the following statistical data: the number of male and female prisoners currently serving their sentences in Russia and the number of male prisoners sentenced to life imprisonment and the number of convictions targeting women, minors or elderly people for which article 57 § 2 of the penal code was applied. However, the Government has neither produced the requested data nor explained the reasons why it did not do so. Instead, it submitted a breakdown of final criminal convictions in 2014 and the first six months of 2015 by gender, age and offense categories. On the other hand, he did not present any scientific study which would have demonstrated his thesis according to which diminished responsibility should be recognized for all people over 65 years old75 . Furthermore, no scientific justification has been provided for the age limit of 65 years, nor any correlation established with the retirement age in Russia, set for men at 60 years old. Of course, the omission of any statistical evidence undermines the credibility of the government's gender and age-related generalizations.

45. On the other hand, the international *soft law* instruments listed above demonstrate the existence of an international trend in favor of the abolition of life imprisonment for minors. I have already had the opportunity to explain, in my opinion attached to the *Muršiÿ* affair *vs. Croatia,* the legal value that *soft law* has in international law and *a fortiori* in the European system. I particularly emphasized that "there is no watertight, binary distinction between *hard law* and non-law, since European human rights law evolves through a rich panoply of sources which do not necessarily present the classic and formal features of binding international law. It is clear that the

75. Paragraph 47 of the judgment.

Resolutions and General Comments cited above, urging States to abandoning the infliction of this punishment on children and adolescents under 18 years of age, combined with the norm explicitly formulated within the Convention on the Rights of the Child, must be considered as having normative value. Therefore, the difference in treatment in favor of minors rests on a legal basis from which it draws its justification.
However, this does not close the discussion, as we will see below.

46. Finally, the argument according to which calling into question the difference in treatment would lead to a leveling “down” of the protection of fundamental rights is purely and simply ineffective. This is what the Government implies by indicating that the applicants “aspire to a change in Russian criminal law which would make it possible to impose harsher sentences on other people, in particular women, juvenile offenders or the elderly aged 65 or over, without their personal situation being changed ”76. Behind this argument, it is the fear of a weakening of the protection of vulnerable groups which is looming. However, calling into question Article 57 §2 of the Russian Penal Code could not lead to such a result, given the conventional obligation to redress the violation of equality “from above”. This is a fundamental guideline which underlies in particular the principles of evolving and *pro persona* interpretation of the Convention mentioned above. Ultimately, this type of argument only aims to mask the real problem in the present case, which is not the refusal to sentence women, minors and the elderly to life imprisonment, but rather the agreeing to sentence men aged 18 to 65 to such punishment. The finding of a violation of Article 14 combined with Article 5 in this case could not have led to the abolition of the protective regime with regard to protected groups, but should have resulted in elderly men benefiting from 18 to 65 years old with the same protection.

B. The incompatibility of maintaining life imprisonment by the Russian criminal code with the Convention (§§ 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 18 to 65. The Government itself, to justify the exclusion of women, young people and the elderly from this type of sanction, invokes the “principles of justice and humanism ”77. This means that the national authorities were already aware of the inhumanity of this treatment. Therefore, maintain it with regard to the majority group (here, male delinquents aged 18 to

76. Paragraph 42 of the judgment.
77. Paragraph 44 of the judgment.

65 years) amounts to considering that it is possible to inflict treatment in contradiction with the principles of justice and humanism on the largest part of the population considered. Ultimately, it doesn't matter whether it's a majority or minority group. It is not possible, while respecting the European system for the protection of human rights and international law, to protect some citizens from ill-treatment while continuing to inflict it on others. Humanistic considerations can only benefit particularly vulnerable groups. Dignity is an inherent quality of the human person which depends neither on age, nor on the crime committed, and even less on gender, within democratic societies.

48. Likewise, it cannot be argued, as the Government does, that the "very harsh" conditions of life imprisonment "would compromise the penological objective of the amendment" for women, minors and elderly men from 65 to more78. This line of argument corresponds to the implicit admission of the fact that the life imprisonment of men aged 18 to 65 does not really aim at the objective of reforming the prisoners, but rather at their indiscriminate punishment and their definitive social exclusion, in the straight line of a strictly repressive penal policy. The Government's argument is particularly misguided because it does not take into account the fact that it is the internal authorities who ultimately have the responsibility for providing a decent and humane environment in detention establishments and this obligation extends to all prisoners, without distinction based on age, sex or other personal characteristics79. Even though there are many more men than women who commit crimes, the Government cannot use this element to justify an inhumane penal policy towards male offenders aged 18 to 65. Otherwise, men aged 18 to 65 sentenced to life imprisonment would be the scapegoats of male offenders, enduring a particularly inhumane sentence to serve an alleged collective sin of the latter category. It would be inappropriate for the Court to declare that female prisoners should be protected from inhuman and degrading treatment, but not their male counterparts.

Unfortunately, the majority does not distance itself from this criminal policy and gives its support.

49. Furthermore, the only legal argument put forward by the majority to refuse to continue the development initiated in the *Vinter* case is the alleged absence of a "common denominator in the domestic legal systems of the Contracting States in this matter "80. However, I specifically recalled above that the international trend is moving towards the abolition of this type of

78. Paragraph 48 of the judgment.

79. See *Mamedova v. Russia* (no. 7064/05, § 73, June 1, 2006).

80. Paragraph 83 of the judgment.

treatment and that, moreover, the Court is not obliged to wait until the development in question has reached maturity to take note of it: on the contrary, it can, and it must, support it and encourage it to the light of an evolving and *pro persona* interpretation of the Convention. A wait-and-see attitude would not correspond to the role and vocation of the Court.

SAW. Conclusion (§ 50)

50. European and international penal policies have reached a sufficient degree of maturity to take a decisive step today and renounce the infliction of life imprisonment. The applicants' arguments in this case should have been heard, to the extent that Russian legislation is the source of discrimination which highlights the need to purely and simply abolish this punishment and, beyond this matter, to support a more general evolution of European human rights law, in accordance with the evolution of democratic societies and with the objective of developing human rights. Like the death penalty, European states can and must today do without this archaic and inhumane sanction, and opt for solutions geared towards the social reintegration of prisoners. The role of the Court is to support and encourage this change, in the light of an evolving and *pro persona* interpretation of the Convention. If the subsidiary position of the Court requires it to respect the specific penal policies of each national system, such fundamental questions do not allow it to remain in the background. Its credibility and authority are at stake, but above all the effectiveness of the rights guaranteed by the Convention.