

IN THE EUROPEAN COURT OF HUMAN RIGHTS  
(Application No. 41418/04)

**Khoroshenko v. Russia**

***WRITTEN COMMENTS***

***BY***

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## I. Introduction

1. These written comments are submitted by Dr Kanstantsin Dzehtsiarou, Dr Rudy Baker, Dr Filippo Fontanelli, Dr Maria Ioannidou, Mr Robert Jago, Dr Theodore Konstadinides and Dr Arman Sarvarian of the University of Surrey (UK) pursuant to the leave granted by Mr. M. O'Boyle, the Deputy Registrar of the European Court of Human Rights (the Court) under Rule 44 § 2 of the Rules of the Court.

2. These comments are limited only to the points of law, including questions of interpretation of the European Convention on Human Rights (the Convention) as well as questions of national law and practice of the Contracting Parties concerning issues of long-term family visits for those sentenced to life imprisonment. These submissions do not include any comments on the facts of the case of *Khoroshenko v. Russia* (Application no. 41418/04). The focus of the comments is on the general principles involved in the case.

## II. Consistency of the Court's Case Law

3. The time has come for reviewing the regime of long-term visits for prisoners serving life terms in Russia. The crucial developments that make this review urgent are the building consensus across the Contracting Parties of the Convention on the matter and the recent evolution marked by the *Vinter* judgment which calls upon the Contracting Parties to assure to all prisoners the right to hope to be released.<sup>1</sup>

4. The judgment in *Vinter* emphasised that the right to hope is primarily founded on the respect for human dignity and on the essential purpose of rehabilitation.<sup>2</sup> In the wake of *Vinter*, certain adjustments are required to ensure that domestic penitentiary systems do not hinder this development in the Court's case law:

It follows from this strong emphasis on human dignity that life sentence prisoners should *now* be able to claim as a matter of right that they should be given opportunities for rehabilitation.<sup>3</sup>

This brief argues that a blanket prohibition of long-term visits for prisoners serving life terms, during the first 10 years of imprisonment, is precisely the kind of measure that requires amendment. As it currently stands, the Russian measure is not only in breach of the Convention in its own right, but risks depriving the *Vinter* advancement of its meaning which is detrimental for evolution of the Convention and development of human rights standards.

## III. Purpose of Criminal Punishment

5. Detention inevitably affects personal liberty but it also restricts other fundamental rights, including the right to family life.<sup>4</sup> However, only unavoidable restrictions are lawful. As the UN Human Rights Committee noted, with specific reference to the enjoyment by prisoners of the rights of the International Covenant on Civil and Political Rights (the ICCPR):

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<sup>1</sup> See, *Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, § 115, 17 January 2012.

<sup>2</sup> Ibid, para. 115.

<sup>3</sup> D van Zyl Smit, P Weatherby, S Creighton, 'Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?' (2014) 14(1) Human Rights Law Review 59, p. 69. (emphasis added).

<sup>4</sup> See, art. 12 Universal Declaration of Human Rights.

... respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. *Persons deprived of their liberty enjoy all the rights set forth in the Covenant*, subject to the restrictions that are unavoidable in a closed environment.<sup>5</sup>

6. Accessory restrictions to prisoners' rights must be based on legitimate aims. Whereas penitentiary policies serve an array of public interests, two of them, reformation and rehabilitation, enjoy priority over the others. The ICCPR refers to this hierarchy in the clearest terms, specifying the State's obligation to design their penitentiary system so that 'the *essential aim* of [it] shall be [the] reformation and social rehabilitation' of prisoners.<sup>6</sup> Other public interests, including punishment and retribution, cannot be pursued at the expense of reformation and rehabilitation without breaching this international standard in the absence of pressing social needs that make restrictions necessary in specific cases (for instance, to preserve safety and public order).

7. If rehabilitation is the most important objective of prison sentences, the appropriate method to secure it is to create a penitentiary system in which inmates are not unnecessarily separated from their families and community. As it has been noted, 'with the decline of faith in the rehabilitative capacity of prison itself, contact with the outside world as a means of reducing the debilitating effects of institutionalization has come to be seen as perhaps the most important rehabilitative strategy in the prison context'.<sup>7</sup>

8. Rehabilitation is essential because prisoners 'will eventually return to the community' and 'prison life has to be organised with this in mind'.<sup>8</sup> Rehabilitation programs are all the more crucial for prisoners serving longer terms, including life sentences, because over time their relationship with the outside world is bound to dwindle. For this reason, long terms 'have to be carefully planned to minimise damaging effects and make the best possible use of their time'.<sup>9</sup>

9. From the above, it follows inescapably that a penitentiary system designed to secure punishment for punishment's sake and failing deliberately to offer rehabilitation opportunities is dysfunctional and promotes a retrograde notion of punishment. The Russian system, which provides for a blanket prohibition of long-terms visits during the first 10 years of life imprisonment, provides a clear illustration of this approach to punishment.

10. In the following paragraphs, our purpose is to assist the Court in determining the legality of the Russian measure at issue under the Convention. We proceed to explain why this measure is, according to studies conducted within our respective fields of expertise, a disproportionate restriction of the right to family life of prisoners. In the alternative, we argue that the measure entails, in any event, a discriminatory treatment that is not justified by reasons of public policy and that arbitrarily afflicts a specific vulnerable group: men serving life sentence.

#### **IV. A Disproportionate Restriction to the Right to Family Life: The 10-year Term Is Set Arbitrarily**

11. Pursuant to Article 124 of the Penitentiary Code of the Russian Federation, the blanket ban on long-term family visits can only be lifted after 10 years of imprisonment. Under no circumstance can this term be shortened. We submit that this period is arbitrary and that the Contracting Party would

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<sup>5</sup> HRC, General Comment on art. 10 ICCPR (emphasis added). See also HRC, *Fongum Gorji-Dinka v. Cameroon*, views of 17 March 2005, communication 1134/2002, para 5.2: 'persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.'

<sup>6</sup> Art. 10(3) ICCPR (emphasis added).

<sup>7</sup> S Livingstone, T Owen and A MacDonald, *Prison law*, (2008, 4th edn., OUP, Oxford) 302.

<sup>8</sup> European Prison Rules, art. 6. A similar notion is enshrined in the ICCPR, art. 10.

<sup>9</sup> *Ibid.*

be unable to prove otherwise. All limitations of the rights of prisoners must pursue a legitimate aim. The government might argue that this limitation can serve some legitimate aims, for instance security and crime prevention both in the prison and outside. However, this aim must be assessed in the specific circumstances of each case, and security concerns cannot be gauged in any reasonable detail through abstract norms. Shorter or longer bans may prove necessary but only, for example, in light of the actual or plausible risk of crime-facilitation or disorderly conduct raised by the allowance of long-term visits.

12. The authors have reviewed a number of criminological and sociological studies, none of which suggests that 10 years is a significant mark into one's imprisonment, or which can authorise a reasonable generalisation regarding behaviour, degree of rehabilitation and reduced dangerousness.<sup>10</sup> The inflexible statutory measure under review that prevents family visits for first ten years of incarceration is indeed based on an arbitrary generalisation; such generalisation is troublesome and reveals its lack of penological rationale. This challenge was aptly captured in the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment (the CPT) report on Russia:

[T]he assumption is often wrongly made that the fact of a life sentence implies that an inmate is dangerous in prison. The placement of persons sentenced to life imprisonment should therefore be the result of a comprehensive and ongoing risk and needs assessment, based on an individualised sentence plan, and not merely a result of their sentence.<sup>11</sup>

#### **V. A Disproportionate Restriction to the Right to Family Life: Right to Hope**

13. In the recent case of *Vinter*, the ECtHR has declared that the UK regime of life imprisonment without parole violates the ECHR. This judgment established that an inmate has a right to hope. *Khoroshenko v Russia* differs from *Vinter* on the merits but the key principle established therein is applicable. We submit that the right to hope cannot merely include hope to be released from imprisonment. Implicit in a fully-realised right to hope is that release will be meaningful, which includes the expectation that the prisoners' families will welcome them back and ease the process of reintroduction into society at large. Long-term visits with family members sustain the inmate's feeling of belonging in their family and the intimacy with the closest relatives. Pursuant to Article 79 of the Russian Criminal Code, prisoners serving life imprisonment can be released after serving at least 25 years. It is the obligation of the State to make sure that the inmate is integrated in the community upon release.<sup>12</sup> It follows that allowing long-term family visits would assist the State in fulfilling this challenging obligation. Whatever the policy reasons behind the discriminatory treatment of prisoners serving life sentence, the concrete possibility of reconsideration of the sentence requires Contracting Parties to discharge the auxiliary obligations geared towards rehabilitation of the convict.

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<sup>10</sup> See, I Ehrlich, 'Participation in Illegitimate Activities: A Theoretical and Empirical Investigation', (1973) 81 *Journal of Political Economy*, 521; S Clarke, 'Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime?' (1974) 65 *Journal of Criminal Law and Criminology*, 528; D Greenberg, 'The Incapacitative Effect of Imprisonment: Some Estimates' (1975) 4 *Law and Society Review*, 541; S Van Dine, J Conrad, and S Dinitz, 'The Incapacitation of the Dangerous Offender: A Statistical Experiment' (1977) 14 *Journal of Research in Crime and Delinquency*, 22.

<sup>11</sup> See, Report to the Russian Government on the visit to the Russian Federation carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 May to 4 June 2012, document CPT/Inf (2013) 41, para. 113.

<sup>12</sup> See, for example, Article 6 of the European Prison Rules.

14. The imposition of the 10-year fixed term ban is particularly unfortunate because it arguably affects the period of imprisonment during which maintenance of family ties is the most crucial; it is reasonable to submit that this arbitrary prohibition will cause, in certain cases, family members to become estranged from the prisoner. In turn allowing long-term visits after 10 years may be considered *useless* as family ties might already have been destroyed. This would happen exclusively due to the lack of adjusting mechanisms in Russian law, which could accommodate for personal circumstances, good behaviour or lack of specific risks for security. In other words, the lack of flexibility of Russian rules has the unintended and paradoxical consequence of running against the main purposes of criminal policies (social rehabilitation and reformation) without achieving any other plausible legitimate aims.

#### **VI. A Disproportionate Restriction to the Right to Family Life: Impact on Correction and Better Behaviour of the Inmates**

15. Inmates are serving life sentences in severe conditions with very limited human interaction. A number of studies have shown that lack of human contact can be detrimental for the physical and mental conditions of inmates.<sup>13</sup> Moreover, this can undermine the security of prison facilities as the inmates might be more prone to disorderly behaviour and expressions of violence in relation to fellow inmates and the prison administration. Moreover, family visits during the first years of incarceration are crucial for reducing recidivism.<sup>14</sup> For years scholars have proposed that allowing long-term family visits reduces the rates of male prison rape. This appears to be recognized by several countries in Europe, Asia, and Latin America that allow for such visits.<sup>15</sup> In fact, in those countries prison officials support that family visits play a vital role in combating prison rape.<sup>16</sup>

16. It cannot be argued that short-term visits can achieve the results outlined in previous paragraph. Studies have indicated that supervised visits can reinforce feelings of loss, isolation and depression amongst family members as well as result in prisoners' rule breaking.<sup>17</sup> On the contrary, studies have shown that unsupervised visits encourage good prison conduct and reduce re-incarceration rates.<sup>18</sup>

17. The role of long-term family visits in relation to correction of inmates is twofold. First, if the administration is able to allow long-term visits upon application, basing the decision on the behaviour of the inmate, the expectation to obtain the permission provides prisoners with a

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<sup>13</sup>See, H Miller and G Young, 'Prison Segregation: Administrative Detention Remedy or Mental Health Problem' (1997) 7 *Criminal Behavior and Mental Health*, 85 (Prison inmates under solitary confinement were more susceptible to mental health problems.); R Wyatt, 'Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?' (2006), 37 *Case Western Reserve Journal of International Law*, 579 (Contacts with family as a measure to prevent rapes in jail.).

<sup>14</sup>Bales and Mears argue that 'greater amounts of visitation, whether over different or continuous months or quarters, have greater effects in reducing recidivism but that the first few visits may exert a greater effect than subsequent ones.' W Bales and D Mears *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?* (2008) 45 *Journal of Research in Crime and Delinquency*, 287, p. 306. See also, J Cochran, 'Breaches in the Wall: Imprisonment, Social Support, and Recidivism' (2014) 51 *Journal of Research in Crime and Delinquency*, 200 (Arguing that, 'specifically, prisoners who are visited early and who experience a sustained pattern of visitation are less likely to recidivate').

<sup>15</sup>C Hensley, S Rutland and P Gray-Ray, 'Conjugal Visitation Programs: The Logical Conclusion' in Christopher Hensley (ed), *Prison Sex: Practice and Policy* (Lynne Rienner, 2002), p. 143.

<sup>16</sup>*Ibid.*

<sup>17</sup>See, B J Freedman and D G Rice, 'Marital Therapy in Prison: One Partner "Couple Therapy"' (1977) 40 *Federal Probation*, 175.

<sup>18</sup>See, *ibid* and J Howser, J Grossman and D MacDonald, 'Impact of Family Reunion Program on Institutional Discipline' (1983) 8 *Journal of Offender Counseling, Services and Rehabilitation* 27.

powerful incentive to comply with prison rules. Second, inmates will exercise additional efforts to qualify for early release, if they have been able to nurture meaningful family relationships all along. It would be self-defeating to implement criminal policies that remove these incentives without the slightest possibility for customised treatment of individual situations. In the ultimate analysis, the Russian regime chooses deliberately to give up on those individuals sentenced with life-imprisonment who might undertake a successful process of rehabilitation.

### **VII. A Disproportionate Restriction to the Right to Family Life: Plausibility of Visits**

18. In the judgment of *Khodorkovskiy and Lebedev v. Russia*, the Court acknowledged that in order to visit inmates, family members possibly needed to travel for many days to reach the penal colony where they were interned.<sup>19</sup> Moreover, the Court emphasised in that case that '[i]n the context of imprisonment ... the *possibility* for close family members to visit a detainee constitutes an essential factor in the maintenance of family life.'<sup>20</sup> Under the current regime in Russia, and in light of the size of territory of the country, relatives might need to travel for days to have a short-term supervised meeting. The logistical hardship and the limited benefits associated with short-term visits might discourage some family members of prisoners serving life sentence to exercise their right to visit. This pragmatic consideration should not be underestimated: the lack of flexibility of Russian rules can entail, in certain situations, a *de facto* disproportionate burden on the exercise of the fundamental right of maintaining family ties. Renunciation of the right to visit by those who would otherwise be willing to exercise it is the ultimate evidence of an inefficient system that is not minimising its unfortunate externalities.

19. This dysfunction of Russian law is particularly lamentable because it does not only affect prisoners, but also their family members, who do not share the criminal responsibility of the prisoner and, therefore, should not have their right under article 8 of the Convention restricted but for the most pressing needs. This problem would be addressed to some degree by envisioning the possibility of applying for long-term visits. Unsupervised interaction and/or longer visits can act as powerful incentives for family members to cultivate the bond with the prisoners even when they are serving life sentence in remote locations.

### **VIII. A Disproportionate Restriction to the Right to Family Life: Sentencing and Proportionality at the Moment of Sentencing**

20. The provision for a fixed 10-year prohibition of long-term visits is the quintessential negation of the principle of the individualisation of criminal sentencing. In its defence, the Russian Federation could argue that national courts consider the specific impact on family life that a life sentence entails when they issue one. As such, there is a stage in which public authorities are able to match the personal profile of the convicted with the punishment. We argue that this argument is incorrect.

21. First, there is no evidence that the restriction on access to family visits features substantively in the sentencing judge's considerations when choosing the criminal sanction. Suggesting that some convict might have been spared from a life sentence exclusively because the national court realised the gravity of the limitations on his family life is mere speculation. The key determinants in the choice of the judge are typically the gravity of the crime and the dangerousness of the defendant, with the high-security regime merely representing an inevitable accessory to the life sentence. Second, the limitations on family rights should depend on the inmate's behaviour while serving his sentence. The sentencing judge cannot with certainty predict how the inmate will behave in prison,

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<sup>19</sup> *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 822-851, 25 July 2013.

<sup>20</sup> *Ibid*, para. 837 (emphasis added).

and most certainly not for as long as ten years. Third, the sole gravity of the crime cannot justify this restriction. In fact, some fixed term sentences can last as long as, or longer than, life imprisonment. For example, an inmate sentenced to 35 years in prison might, in certain circumstances, serve longer than an inmate sentenced to life.<sup>21</sup> However, the former will have access to long-term family visits from the beginning while the latter will get access to them only 10 years into his imprisonment, when it might be too late to use them.

#### **IX. Discrimination**

21. Should the Court consider that the Russian blanket ban entails no direct breach of the Convention, it would nevertheless be unlawful because it only affects certain groups of prisoners and spares others, without a reasonable justification. Russia indeed affords the right to access long-term visits to certain prisoners: even if this benefit were provided not as a matter of obligation but of unilateral policy, the differential treatment between high-security and other prisoners is discriminatory, as it is not warranted on the basis of relevant different circumstances.

22. Other institutions of the Council of Europe have already confirmed that the possibility of accessing long-term visits must be afforded to those serving life terms if other inmates enjoy it. In the CPT report adopted in March 2000 in relation to prison conditions in Ukraine, the CPT pointed out that Ukraine should lift a blanket ban on visits for those sentenced to life imprisonment. The CPT requested that their treatment be made equal to that of prisoners serving fixed terms.<sup>22</sup> Ukraine has recently adopted a new law implementing this recommendation.<sup>23</sup> By the same token, the Russian measure pursuant to which family visits are prohibited for ten first years is discriminatory.

#### **X. Discrimination on the Grounds of Gender**

23. According to Section 2 Article 57 of the Russian Criminal Code, women cannot be sentenced to life imprisonment. Therefore, the limitation in question is never applicable to women, irrespective of their personality or the gravity of their crimes. The Contracting Parties' criminal policy falls in principle under their margin of appreciation. However, the Contracting Parties are in violation of the Convention if two groups of individuals are treated differently and their status is essentially the same for the purpose of the treatment considered. In Russia, two individuals who committed exactly the same crime might be treated differently merely on the basis of their gender, which demonstrates that there is no link between the differential treatment and any plausible policy objective. If restrictions to family life were genuinely commensurate to the nature and seriousness of the crime and to the danger posed by the convict, it should not be possible that two persons convicted for the same crime are subjected to widely different regimes with respect to long-term visits only because their gender is not the same. Gender-based discrimination can be justified only in exceptional circumstances, and nothing suggests that the Russian measure pursues a legitimate objective. If the exemption for women is inspired by humanitarian motives, there is no reason why men should not enjoy it as well.

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<sup>21</sup> Pursuant to article 79 of the Russian Criminal Code an inmate serving life imprisonment can be released after 25 years in prison under certain circumstances.

<sup>22</sup> See, Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 26 September 2000, document 2000CPT/Inf (2002) 23. See, in particular, para 70, 73, 79 and 122.

<sup>23</sup> Relevant changes were adopted in 2014. See, the Criminal Code of Ukraine. Accessed on 08/06/2014 <http://zakon2.rada.gov.ua/laws/show/1129-15/print1400064051264750> in Ukrainian. Article 151.

24. As early as in 2000, the UN Human Rights Committee noted that State parties to the ICCPR must also report to the Committee 'on any difference in treatment between male and female persons deprived of liberty, such as, for example, access to rehabilitation and education programmes and to conjugal and family visits.'<sup>24</sup> It is evident that differential treatment based on gender is unacceptable in this matter.<sup>25</sup>

### **XI. Discrimination of a Vulnerable Group (Prisoners Serving Life Sentences)**

25. The Russian measure is also unjustifiably discriminatory in that the difference in the treatment between high-security prisoners and other prisoners is arbitrary. As a result, the application of Russian law can result in a disproportionate disadvantage for certain prisoners that does not reflect in the slightest the difference in the relevant circumstances on which all lawful differentiation must be based. The blanket prohibition of long-term visits for 10 years cannot be shortened, does not allow for exceptions and fails to pursue the general principle of the individualisation of criminal sentencing. This ban does not allow taking into account the inmate's behaviour in prison, his personal and family situation or any other relevant circumstances. Whereas a prisoner sentenced to a fixed term of 35 years in prison<sup>26</sup> is entitled to apply for long-term visits, a person sentenced to life imprisonment (i.e., with a prospect of being released after 25 years in prison), and who complies with the prison rules, would have absolutely no chance to access long-term visits for the first ten years. We submit that this treatment is discriminatory. As seldom as this paradoxical outcome might occur, it is illustrative of the inherent arbitrariness of the 10-year ban. No matter how narrow the conditions to obtain leave for long-term visits, no prisoner should be deprived of the possibility to try to meet them.

26. It was maybe possible to justify this differential treatment, at least in part, on the basis of the peculiarity of life-imprisonment, i.e., the expectation that no release will ever be granted. This is no longer possible: life-imprisonment cannot obliterate the right to apply for release and the *Vinter* judgment made this point clear. Prisoners serving life terms and all other prisoners are equal in the only circumstance that matters for the design of restrictions to family life: they all have the right to rehabilitate themselves and to hope for a successful reintroduction into society. As it was noted:

Once it has been recognised that all life sentenced prisoners, including those with whole life orders, and indeed all other (sentenced) prisoners should have the opportunity to improve themselves so that they can hope for release, the inescapable logic is that they should also all have a claim to be able to improve themselves, lest they be given no hope of eventual release because no means of (self) improvement are available.<sup>27</sup>

### **XII. International and European Trend: Subject Matter**

27. As we have acknowledged the Contracting Parties have broad margin of appreciation in the area of penal policy. However, this margin is limited when there is European consensus on that issue. Firstly, we argue that there is indeed European consensus on the matter that no blanket discrimination should be allowed in treating various groups of inmates differently. In other words if

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<sup>24</sup> HRC, General Comment No. 28 'Equality of rights between men and women (art. 3)', 29 March 2000, para 15.

<sup>25</sup> See also jurisprudence of Inter-American Court of Human Rights. I-ACionHR, Follow-Up Report on the State of Guatemala's Compliance with the Recommendations Made by the IACHR in its Fifth Report on the Situation of Human Rights in Guatemala (2001), 7 March 2003, OEA/Ser.L/V/II.117, Doc. 1 Rev. 1, para 168, 182-183.

<sup>26</sup> Article 56 of the Criminal Code of Russia.

<sup>27</sup> van Zyl Smit, Weatherby and Creighton, *supra* note 3, p. 70.



long-term or conjugal visits are not allowed they are not allowed to all long-term prisoners; if they are allowed then those serving life imprisonment should have access to them. Secondly, among those countries which allow long-term family visits there is a tendency of spreading them onto inmates serving life imprisonment. These conclusions will be expanded upon in the following paragraphs.

28. In the present case it is important to choose proper comparators to reveal fair and objective results of comparative research.<sup>28</sup> Two questions should be considered in this case – whether the Contracting Parties allow different treatment to the groups of inmates and, if long-term family visits are allowed, would they be at least theoretically available to those serving life imprisonment. These two questions should be dealt with separately: traditionally post-Soviet states had a regime of long-term family visits and the developments in these states are the primary focus of the following sections.

### **XIII. European and International Trend: No Difference in Treatment**

29. In many European states the same regime of visitation applies to various prisoners: men and women, those in prison for life or long fixed terms. Moreover, in the majority of States examined the decision about allowing the visitation or not is taken on the basis of the inmate's behaviour, not of the general group he or she belongs. The UK regime is illustrative here.

30. In the UK family visits are usually discussed within the framework of conjugal visits. The UK position is that conjugal visits are not available. However, the prison system operates an early release system which allows prisoners to either go home early or have periodic leave (usually over weekends) to enable resettlement. These visits are clearly meant to serve the same purpose as a conjugal visit. There are insufficient resources for conjugal visits within UK prisons, but the UK offers a process which treats all prisoners equally in that there is no distinction between those serving life sentences and those subject to other sentences. The decisions concerning release do involve extensive risk assessments but they are prisoner focused rather than sentence focused.<sup>29</sup>

### **XIV. European and International Trend: Development in Post-Soviet States**

31. It is important to narrow down the sample of the states discussed to those where a similar regime of long-term family visits exists. It is an oversimplification to say that there are no long-term visits in the UK and therefore their prohibition is justified in Russia. A more appropriate question here is whether similar regimes exist at all and how they are regulated. The penitentiary codes of many post-Soviet states contained similar provisions which did not allow long-term visits for those who are in prison for life. Having said this, in a number of these countries such provisions have recently been amended.

32. Ukraine. As it has already been mentioned Ukraine has recently changed its Penitentiary Code. In the recent past those imprisoned for life did not have access to long-term family visits.<sup>30</sup> Following recent amendments and pursuant to article 151 of the Penitentiary Code, those in prison for life can have one short-term visit per month and one long-term visit per three months.

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<sup>28</sup> See, K Dzehtsiarou and V Lukashevich, 'Informed Decision-Making: the Comparative Endeavours of the Strasbourg Court' (2012) 30 Netherlands Quarterly of Human Rights, 272, pp. 290-292; K Dzehtsiarou and C O'Mahony, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court' (2013) 44 Columbia Human Rights Law Review, 309, pp. 340-347.

<sup>29</sup> Visits are governed by Rule 35 of the Prison Rules 1999 and Temporary release is governed by Rule 9 of the Prison Rules 1999.

<sup>30</sup> See, *Aliev v. Ukraine*, no. 41220/98, 29 April 2003.

33. Azerbaijan. According to Article 122 of the Code of Execution of Punishment of Azerbaijan, those convicted to life imprisonment can have six short term and two long term visits per year. If the inmate cooperates with the prison administration the number of long term visits can be increased to three.

34. Armenia. Pursuant to the Criminal Execution Code of Armenia, all inmates are entitled to have both short-term and long-term visitations.<sup>31</sup> A separate regime has been established for persons convicted of serious crimes of fixed-term or life sentences. However unlike in Russia, Armenian law just reduces the number of visitations from six per year in case of all other inmates to one per year in case of those convicted for life.<sup>32</sup> The indicated limitation dissipates when the convict has served the minimal sentence for parole foreseen by the Criminal Code of the Republic of Armenia for his sentence. This regime manages to balance well the security considerations and respect to private life of the inmates.

35. Latvia. According to the Latvian Sentence Enforcement Code, life sentenced prisoners may receive three long-term and four short-term visits per year. Long-term visits are shorter than in other post-soviet countries, namely from six to twelve hours, but they are not supervised by the prison administration.

36. Lithuania. Pursuant to Article 94.3 of the Criminal Execution Code of Lithuania, all convicts, including those serving life imprisonment, have a right to long-term family visits.

37. It seems that recent developments in former Soviet countries are even more significant in this case than more widespread developments across Europe. This is so because the states in question had similar laws in the 90s and immediately after accession to the Convention and the trend here is clearly traceable. It seems that three states out of five studied have changed their approach to long-term family visits and they have done so recently. The Court can confirm this trend in its judgment in *Khoroshenko v. Russia*.

## **XV. European and International Trend: Practice of International Criminal Tribunals**

38. A clear analogy can be drawn concerning the provision of access to family visits for prisoners between the incarceration systems of the Russian Federation on the one hand, and those of international criminal tribunals on the other hand,<sup>33</sup> because of the extraordinary logistical problems for prisoners and their families caused by the long distances between prisons and families' residences, which can make visits a costly endeavour in time and money.<sup>34</sup> An additional similarity is the gravity of the crimes of which the prisoners have been convicted: in international criminal tribunals, these will typically entail genocide, war crimes and crimes against humanity, which pertain to violent offences (e.g. – murder) that overlap with those for which the Penitentiary Code of the Russian Federation provides for restricted rights to family visits. It is noteworthy that the practices of international criminal tribunals have been influenced by the Article 8 jurisprudence of the Court.<sup>35</sup>

39. In general, international criminal tribunals provide for a general right to receive visitors which can only be restricted by the prison on prescribed grounds of good order, security or in the interests

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<sup>31</sup> Criminal Execution Code of Armenia. Article 92.

<sup>32</sup> *Ibid.*

<sup>33</sup> This submission principally addresses the practices of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia.

<sup>34</sup> On international criminal tribunals, see generally D Abels, *Prisoners of the International Community* (2012, Asser Press), 521-760, esp. 525-663.

<sup>35</sup> *Ibid.*, 525-553.

of justice.<sup>36</sup> Such grounds may include, for example, a visit by a former prisoner. Visitors are required to comply with the application and security procedures of the visitation regime. Although visits are typically conducted within sight but not within hearing of guards, some tribunals provide for more private and/or conjugal visits upon application. Although the prison regimes of international criminal tribunals are not without their problems, in the main the philosophy of providing for a general right to family visits subject to prescribed restrictions appears to reflect a balanced approach to the policy demands of punishment, rehabilitation and security.

## **XVI. Conclusion**

40. We would like to draw the attention of the Court to two main issues. First, the decision in the present case can be a logical continuation of the Court's judgment in *Vinter v the United Kingdom* that emphasised that right to hope and rehabilitation are crucial aspects of criminal punishment. Moreover, this principle of rehabilitation has been widely deployed by the CPT and other international agencies in their recommendations and the Court has a chance to authoritatively confirm it.

41. Second, the blanket regime in force in Russia is discriminatory as it is only applicable to one group of inmates and does not take into account their behaviour, family situation and other relevant considerations and based entirely on the fact that the convict was sentenced to life imprisonment.

42. The authors of these written comments are of the opinion that the Russian Federation should amend its long-term visitation regime to life imprisonment as the current legal regulation goes against Article 8 of the Convention.

### ***The written comments were prepared by***

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On behalf of the authors

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<sup>36</sup> ICTY Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal (21 July 2005), Rule 61(A): 'Detainees shall be entitled to receive visits from family, friends and others, subject only to the provisions of Rules 64 and 64 bis and to such restrictions and supervision as the Commanding Officer, in consultation with the Registrar, may impose. Such restrictions and supervision must be necessary in the interests of the administration of justice or the security and good order of the host prison and the Detention Unit.'