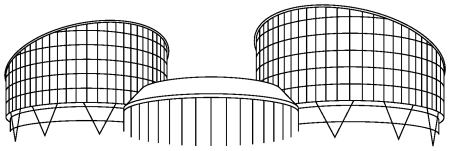

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MURRAY v. THE NETHERLANDS

(Application no. 10511/10)

JUDGMENT

STRASBOURG

26 April 2016

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

In the case of Murray v. the Netherlands,

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

Guido Raimondi, *President,*
Dean Spielmann,
András Sajó,
Işıl Karakaş,
Angelika Nußberger,
Khanlar Hajiyev,
Nebojša Vučinić,
Ganna Yudkivska,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Erik Møse,
André Potocki,
Paul Mahoney,
Johannes Silvis,
Valeriu Griţco,
Faris Vehabović,
Jon Fridrik Kjølbro, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 14 January 2015 and on 4 February 2016,

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

PROCEDURE

1. The case originated in an application (no. 10511/10) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr James Clifton Murray ("the applicant"), on 22 February 2010. The applicant passed away on 26 November 2014. On 6 December 2014 his son, Mr Johnny Francis van Heyningen, and his sister, Ms Altagracia Murray, expressed their wish to pursue the case before the Court.

2. The applicant was represented by Mrs C. Reijntjes-Wendenburg, a lawyer practising in Maastricht. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, of the Ministry of Foreign Affairs.

3. The applicant initially alleged that, in violation of Article 3 of the Convention, his life sentence was *de jure* and *de facto* irreducible. Relying

on the same provision, he also complained of the conditions of his detention in prisons in Curaçao and Aruba, namely of the condition of prison buildings and the absence of a separate regime for life prisoners. He also claimed that he had not been placed in a regime befitting his mental condition and that this constituted a further violation of Article 3. On 2 November 2012, following the conclusion of the review of the applicant's life sentence (see paragraphs 4 and 31-32 below), he expanded on the complaint under Article 3 about the alleged irreducibility of his life sentence, claiming that even if a *de jure* possibility of release had been created, *de facto* he had no prospect of release as he had never been provided with psychiatric treatment and the risk of recidivism would therefore continue to be considered too high.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 15 April 2011 notice of the application was given to the Government. The examination of the case was adjourned on 29 November 2011 pending a periodic review of the applicant's life sentence (see paragraphs 31-32 below) and was resumed on 19 November 2013. On 10 December 2013 a Chamber composed of the following judges: Josep Casadevall, President, Alvina Gyulumyan, Corneliu Bîrsan, Ján Šikuta, Nona Tsotsoria, Kristina Pardalos, Johannes Silvis, judges, and also of Santiago Quesada, Section Registrar, having deliberated in private, delivered its judgment. It decided unanimously to declare inadmissible a complaint under Article 3 of the Convention concerning a lack of safeguards against inter-prisoner violence, complaints under Article 5 §§ 1 and 4 and Articles 6 and 13, as well as a complaint that the continued applicability of Curaçaoan law to his detention in Aruba was incompatible with international law. It unanimously declared admissible the remaining complaints under Article 3 and held that there had been no violation of that provision in respect of the life sentence and no violation in respect of the prison conditions.

5. In a letter of 5 March 2014 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. The Panel of the Grand Chamber granted the request on 14 April 2014.

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. The applicant and the Government each filed written observations (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 January 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr R.A.A. BÖCKER, Ministry of Foreign Affairs, *Agent*,
Mr M. KUIJER, Ministry of Security and Justice,
Mr A. VAN DER SCHANS, advocate-general, Curaçao Public Prosecutor's Office, *Advisers*;

(b) *for the applicant*
Mrs C. REIJNTJES-WENDENBURG, *Counsel*,
Prof. J. REIJNTJES, *Adviser*.

The Court heard addresses by Mrs Reijntjes-Wendenburg and Mr Böcker and also their replies and those of Prof. Reijntjes and Mr Kuijer to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1953 on the island of Aruba. In 2013, while serving a sentence of life imprisonment in a prison in Aruba, he was diagnosed with terminal cancer. In September 2013 he was transferred from the prison to a nursing home in Curaçao. On 31 March 2014 he was granted a pardon (*gratie*) entailing his immediate release. He returned to Aruba, where he passed away on 26 November 2014.

A. Constitutional context

9. At the time the applicant was convicted and sentenced, the Kingdom of the Netherlands consisted of the Netherlands (the Realm in Europe) and the Netherlands Antilles (consisting of the islands Aruba, Bonaire, Curaçao, Sint Maarten, Sint Eustatius and Saba). On the Netherlands Antilles, the Head of State of the Kingdom (the Queen, at that time) was represented by a Governor. In 1986 Aruba became an autonomous "country" (*land*) within the Kingdom, having its own Governor. From 10 October 2010 the Netherlands Antilles ceased to exist other than as a collective name for the six islands in the Caribbean Sea belonging to the Kingdom of the Netherlands. The Kingdom currently consists of four autonomous countries: the Netherlands (i.e. the Realm in Europe), Aruba, Curaçao and Sint Maarten, whereas Bonaire, Sint Eustatius and Saba are special municipalities of the Netherlands. Each of the three island countries (Aruba, Curaçao and Sint Maarten) has a Governor.

10. The countries of the Kingdom have their own legal systems, which may differ from each other.

11. The Joint Court of Justice of the Netherlands Antilles, which imposed the life sentence on the applicant in 1980, became the Joint Court of Justice of the Netherlands Antilles and Aruba in 1986, and is currently called the Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba. For ease of reference it will hereafter generally be referred to as "the Joint Court of Justice".

B. The applicant's conviction

12. On 31 October 1979 the First Instance Court (*Gerecht in Eerste Aanleg*) of the Netherlands Antilles found the applicant guilty of the murder of a six-year-old girl on the island of Curaçao. The judgment of the First Instance Court included a summary of a psychiatric report that had been drawn up at the request of the public prosecutor (*Officier van Justitie*). The conclusion reached by the psychiatrist was summarised as follows in the judgment (the conclusion and advice contained in the psychiatrist's report are set out in full in paragraph 33 below):

> "... That the defendant suffers from a pathological disturbance, in particular a very limited development of his mental faculties ... Considering this, the defendant should be regarded as having diminished criminal responsibility (*verminderd toerekeningsvatbaar*), but nevertheless should mainly be held criminally liable for his actions. It is noted in particular that the defendant cannot be considered to have been mentally insane before, during or after the commission of the crime ... Even though the defendant is capable of committing a similar offence in the future, it is not necessary to commit him to a regular mental hospital (*krankzinnigengesticht*), but instead he should be placed in a custodial clinic for psychopaths (*psychopatenasiel*) to undergo a rather lengthy treatment under very strict surveillance. In Curaçao there is a choice only between prison and the national (regular) mental hospital (*Landspsychiatrisch Ziekenhuis*). Taking into consideration that the risk of recidivism is for the time being very high, even if treatment would possibly start immediately, and that, consequently, intensive surveillance is of primordial importance (such surveillance being impossible in the national mental hospital), and the fact that the defendant is not to be considered criminally insane within the meaning of the law, admission to the national mental hospital is wholly contra-indicated. The sole option remaining is for him to undergo his punishment in prison (transfer to a custodial clinic in the Netherlands is impossible on account of the defendant's limited intelligence and insufficient ability to express himself verbally). It is strongly advised that, where possible in the prison setting, an attempt should be made to attain a stronger personality structure in the defendant in order to avoid recidivism in the future."

13. The First Instance Court considered that a life sentence, the imposition of which had been sought by the Public Prosecutor, would only be condign punishment if it was established from the outset that the applicant's condition was not amenable to improvement. As the court found that this could not be deduced from the psychiatrist's report, it sentenced the applicant to twenty years' imprisonment.

14. Both the applicant and the Public Prosecution Service (*Openbaar Ministerie*) submitted an appeal against the judgment of the First Instance Court.

15. On 11 March 1980 the Joint Court of Justice of the Netherlands Antilles quashed the judgment of the First Instance Court. It convicted the applicant of murder, finding it proven that he had deliberately and with premeditation taken the life of the six-year-old girl. It held that he had conceived the intention and taken the decision to kill her after calm consideration and quiet deliberation, and in order to execute that intention, had stabbed her repeatedly with a knife, as a result of which she had died. The applicant had killed the child, who was the niece of an ex-girlfriend, in revenge for the latter's ending of their relationship. The Joint Court of Justice sentenced the applicant to life imprisonment. In this connection it cited part of the psychiatrist's report as summarised in the judgment of the First Instance Court (see paragraph 12 above) and furthermore held, *inter alia*, as follows:

> "Considering that in view of the findings of the psychiatrist, which the court accepts and adopts as its own, and in particular the fact that the risk of recidivism is very significant, the interest of society in being protected against any such recidivism should, in the opinion of the court, carry the most weight, having regard to the personality of the accused;
>
> Considering that − however regrettable − there is no possibility in the Netherlands Antilles for the imposition of a TBS order (*terbeschikkingstelling met bevel tot verpleging van overheidswege*) for confinement in a custodial clinic, which would be the most appropriate measure in this case; that placement in a custodial clinic in the Netherlands in similar cases has in the past proved impracticable – as is known to the court *ex officio* – and is in the present case moreover considered impossible by the psychiatrist due to the accused's limited intelligence and insufficient ability to express himself verbally;
>
> Considering that in the present case there is no way in which the aforementioned preponderant interest can adequately be protected in these lands other than through the imposition of a penalty which will prevent the accused's return to society, and thus that only a sentence of life imprisonment qualifies as suitable;
>
> Considering that the court is aware that this sentence does not – in principle – provide the accused with any prospect of one day returning to society as a free man, a fact which will presumably make this sentence heavier to bear for the accused than a temporary sentence of imprisonment, but which in the court's opinion should not lead to the aforementioned interests, which, as set out above, should carry the most weight, being sacrificed;
>
> ...
>
> ... sentences the accused to imprisonment for life;
>
> ..."

16. On 25 November 1980 the Supreme Court (*Hoge Raad*) dismissed the applicant's appeal in cassation against the judgment of the Joint Court of Justice.

17. On 24 November 1981 the applicant filed a request for revision with the Joint Court of Justice which was rejected on 6 April 1982.

C. The applicant's detention

18. The applicant served the first nineteen years of his sentence in the Koraal Specht prison (which was subsequently renamed Bon Futuro and is currently called *Sentro di Dentenshon e Korrekshon Korsou* or SDKK) in Curaçao. This prison has, since 1990, accommodated a special unit for prisoners showing signs of mental illness or serious behavioural disorders, the so-called Forensic Observations and Counselling Unit (*Forensische Observatie en Begeleidings Afdeling* – "FOBA"). The FOBA comprises two separate sections, one for observation and one for treatment. Although the applicant submitted that he had spent some time in the observation section, the Government stated during the hearing before the Grand Chamber on 14 January 2015 that while he was detained in Curaçao the applicant had not been placed in either unit.

19. The applicant's first thirteen years in prison were marked by incidents: fights, extortion, drug abuse, etc., some of which led to periods spent in solitary confinement.

20. On 1 December 1999 the applicant was transferred to the *Korrektie Instituut Aruba* ("KIA" – also referred to as the *Instituto Coreccional Nacional* or "ICN") in Aruba, having repeatedly requested such a transfer from 1985 onwards, in order to be closer to his family. At the same time the responsibility for the execution of the applicant's sentence was transferred from the authorities of the Netherlands Antilles to those of Aruba. By agreement of 1 December 1999 the Minister of Justice of Curaçao, however, made the transfer conditional, stipulating that any measure (e.g. pardon, reduction of sentence, temporary leave) involving the applicant's release from prison would be subject to the consent of the Curaçao Public Prosecution Service.

D. Requests for pardon

21. In the course of his incarceration the applicant unsuccessfully petitioned for a pardon on a considerable number of occasions; the exact number cannot be ascertained since the files are no longer complete owing to the lapse of time. From the information and documents contained in the Court's case file, the following events can be established.

22. In a letter of 26 April 1982 the applicant requested that the Minister of Justice of Curaçao review his life sentence and give him some kind of relief. He submitted that the prison where he was being detained offered no educational or vocational programme capable of benefitting his personal and mental development, whereas the frustration and disappointment of

being isolated and neglected was creating mental anguish that would surely drive him to the brink of mental illness. This request was rejected by the Governor of the Netherlands Antilles on 9 August 1982 for the reason that there were no grounds on which to grant it.

23. A request lodged on an unknown date was rejected on 29 November 1983. It appears that the applicant also lodged requests on 6 June 1990, 11 April 1994 and 17 May 1996 but no further information has been provided about them.

24. The case file contains a number of documents (hereinafter called "consultation sheets") on which each of the three judges, who were consulted before the Joint Court of Justice issued its advice to the Governor on a particular application for pardon, could write their opinion about that application. One of the judges consulted about the applicant's request for a pardon of 31 July 1997 wrote as follows in October 1997:

> "... It can be deduced from the psychiatric report in the file that the risk of recidivism was deemed great. The psychiatrist considered that treatment of the petitioner in prison was indicated, but nothing has of course come of this. I still find that it would be irresponsible to grant a pardon to the petitioner, who has in the meantime reached the age of 44. ..."

A second judge wrote on the consultation sheet that he agreed with his colleague, and that a new psychiatric report might be requested, which could also be important for the future in order to be able to monitor the applicant's development and in due course perhaps advise positively on a request for a pardon.

In a letter of 22 October 1997 the Joint Court of Justice advised the Governor not to grant a pardon, writing, in so far as relevant, as follows:

> "... It appears from the psychiatric report in the file that the petitioner has very inadequately developed mental faculties ... In said psychiatric report it is concluded that the petitioner is certainly capable of committing the same offence or of disrupting public order in a different way. The court notes that the petitioner has not undergone any (psychiatric) treatment in prison aimed at strengthening his personality structure in order to prevent him reoffending in the future.
>
> As the crime committed by the petitioner shocked the legal order so profoundly, the granting of a pardon would not be understood by the community, not even after such a long time.
>
> Having regard to the foregoing the court is of the view that for the time being it would be irresponsible to pardon the now 44-year-old petitioner.
>
> The Public Prosecutor Service has attempted, so far in vain, to bring about the petitioner's transfer to the KIA in Aruba, in accordance with his wishes, in view of the fact that he has relatives living there. This wish of the petitioner ought now to be acted upon. The court therefore supports this reasonable desire of the petitioner."

The request for a pardon was refused on 20 November 1997.

25. On 30 January 2002 the Acting Governor of the Netherlands Antilles rejected the applicant's request of (probably) 14 August 2001 to reduce his

sentence by means of a pardon, considering that no facts or circumstances justifying such a course of action had either been adduced or become apparent.

26. On 26 January 2004 the Advocate General of the Netherlands Antilles wrote, in so far as relevant, as follows to the Joint Court of Justice in relation to the applicant's request for a pardon lodged on 27 October 2003:

> "... The opinion of the Public Prosecution Service is unchanged. Prior to committing the offence at issue the suspect [*sic*] had been convicted of raping a young girl and sentenced to imprisonment. That sentence did not have a preventative effect on the petitioner. The petitioner was extensively examined in relation to the offence at issue and the extensive report explicitly mentions the risk of recidivism. It does not appear that the circumstances have changed.
>
> ... The granting of a pardon on humanitarian grounds will, even if such reasons can be said to exist (*quod non*), not be understood by society nor, in my view, be accepted. Humanitarian grounds may be said to have been the basis for the transfer to the KIA. As far as I am concerned that is sufficient."

One of the judges of the Joint Court of Justice, while subscribing to the negative advice given by the Advocate General, wrote on the consultation sheet:

> "At some point in time a moment will however arrive when mercy comes before law. That moment has not been reached yet, but it may do in ten or twenty years."

The Joint Court of Justice advised that the applicant's request be refused on the grounds indicated in the advice of the Advocate General of 26 January 2004.

27. The Procurator General, in a letter to the Joint Court of Justice of 5 August 2004, recommended that that court issue negative advice on the application for a pardon lodged by the applicant on 17 June 2004. He wrote, in so far as relevant, as follows:

> "... Having regard to the content of his request for a pardon together with the interview with him that was recently broadcast on television, the petitioner obviously still does not, in my opinion, realise the gravity of the diabolical act committed by him on 23 May 1979. ...
>
> In the interview ... Murray also had the nerve to play down his heinous crime by saying that others who had already been released had committed more serious offences. ...
>
> The petitioner has never – either at the trial, on the delivery of the verdict, or in the aforementioned interview – shown remorse. ...
>
> Murray claims that he has behaved like a model prisoner in the course of the past twenty-two years. Nothing could be further from the truth; in any event, not as regards the period of detention spent in prison here [i.e. in Curaçao]. During those years the petitioner has misbehaved numerous times, *inter alia* by issuing threats, committing thefts, fighting with fellow inmates, committing indecent acts with third parties, and attempting to poison a fellow inmate. ...

> Although he may lately have displayed good behaviour, this does not detract from the fact that the consequences of his demonic deed can never be redressed, while it has appeared, also in view of the recent reactions in our community, that society remains deeply shocked. Our society cannot afford to take any risks with such a murderous psychopath. In order for our community's interests to be adequately protected, the return of the petitioner to that community is to be prevented. In my opinion it cannot be excluded that this solidly built 51-year-old man, with his serious criminal behaviour ..., and currently in the prime of his life, will once again reoffend.
>
> The above-mentioned interview as well as the fact that he (even though he is entitled to do so) has once again seen fit to lodge a request for a pardon for the umpteenth time has caused great commotion in our society. Anxious civilians, also including relatives of the victim, have fiercely protested in the media against a possible pardon. ...
>
> The opinion, voiced occasionally, that a life sentence in practice boils down to a sentence of between twenty and twenty-five years is not based on the Criminal Code and does not find support in law either. The Antillean legislator has also never intended for this to be the case. ..."

The request for a pardon was rejected by the Governor on 1 March 2006 for the reason that no facts or circumstances justifying a pardon had either been adduced or become apparent.

28. In a letter of 28 September 2007 the Joint Court of Justice advised the Governor to reject a request for a pardon lodged by the applicant as there was no appearance of any circumstance which the trial court had failed or had been unable to take (sufficiently) into account at the time of its decision and which, had the court been sufficiently aware of it, would have caused it to impose a different sentence or to refrain from imposing any sentence. Neither had it become plausible that the execution of the trial court's decision or its continuation did not reasonably serve any of the aims pursued through the application of the criminal law.

The petition for pardon to which this advice of the Joint Court of Justice related was rejected by the Governor, on the grounds set out in that advice, on 16 January 2008.

29. In January 2011 the three judges consulted about a request for a pardon submitted by the applicant on 31 August 2010 wrote on the consultation sheet, respectively, "no grounds present", "reject" and "reject".

30. On 29 August 2013 the applicant requested a pardon in view of his deteriorating health. The head of the social work department of the prison in Aruba advised that a pardon be granted, as this would allow the applicant to die in a dignified manner in the presence of his family. By a decision of 31 March 2014 the Governor of Curaçao acceded to this request and granted the applicant a pardon (see also paragraph 8 above), entailing the remission of his prison sentence, as in the circumstances the further execution of that sentence was no longer deemed to serve a useful purpose.

E. Periodic review

31. On 21 September 2012 the Joint Court of Justice, having submitted the applicant's life sentence to the periodic review prescribed by Article 1:30 of the Curaçao Criminal Code, which had entered into force on 15 November 2011 (see paragraphs 55-56 below), decided that the applicant's custodial sentence still served a reasonable purpose after thirty-three years.

32. The decision of the Joint Court of Justice firstly sets out the proceedings which took place before that court: hearings had taken place on 10 May and 6 September 2012, at which the applicant, who was represented by counsel, was heard. A member of staff of the prison in Aruba was also heard, as were the psychologist M.V., the psychiatrist G.E.M. and relatives of the victim and their representative. The decision cites relevant parts of the sentencing court's judgment of 11 March 1980 and summarises the findings contained in the reports drawn up about the applicant for the purpose of the periodic review (see paragraphs 36-42 below). A section entitled "The position of the relatives of the victim" reads as follows:

> "The relatives indicated at the hearing that they did not agree with a possible release of the convicted person. They stated that news of a possible release had reopened old wounds, that they were experiencing the psychological consequences of this, and that they were afraid of the convicted person. He has threatened them in the past and they have not observed any feelings of remorse or regret in him.
>
> The relatives' representative submitted that the risk of recidivism was unacceptable for them.
>
> In a report drawn up by the Curaçao Foundation for Probation and Social Rehabilitation of 10 May 2012 the Rapporteur addresses the position of the relatives. The Rapporteur notes in the first place that the relatives have so far barely been provided with psychological help or with support in coming to terms with their bereavement. He concludes that the victim's mother still appears to struggle with issues she has not dealt with and about which she barely speaks, and that the father requires professional help in order to cope with his feelings. The relatives have told the Rapporteur that they feel insecure at the mere thought of the convicted person being released. They have further indicated that ever since the arrest of the convicted person and until the present time they have been 'living in a prison' and that this has also had adverse repercussions on their other children. The Foundation for Probation and Social Rehabilitation concludes that a possible conditional release of the convicted person would at this stage have far-reaching psychological consequences for the relatives."

The decision goes on to observe that, in the acting Procurator General's submission, there was not a single objective indication from which it could be inferred that the risk of the applicant's committing an offence had disappeared or diminished, that an early release would seriously shock the surviving relatives, and that it would also shock society to such an extent that this would hinder the applicant's possible reintegration. After describing the position put forward on behalf of the applicant, the Joint

Court then came to its assessment, which, in so far as relevant, reads as follows:

"...

8.2 The convicted person's deprivation of liberty has at present lasted considerably more than twenty years, namely over thirty-three years. The court must therefore assess whether the further unconditional execution of the life sentence no longer serves a reasonable purpose.

8.3 It follows from the reasons given by the [sentencing] court for the imposition of the life sentence ... that the aim of this sentence was to protect society against recidivism by the convicted person. The risk of recidivism was deemed by the [sentencing] court to be particularly high, while treatment was not considered possible.

8.4 The court will therefore first and foremost have to assess to what extent the risk of recidivism existing at the time is still present today. In this connection it is firstly to be noted that at the time that risk was deemed to be particularly high in view of the personality of the convicted person, and that since then no treatment in any shape or form has taken place.

8.5 After the court had commissioned two experts at its hearing of 10 May 2012, psychologist M.V. and psychiatrist G.E.M. reported on the convicted person's personality and the risk of recidivism. Unlike the defence, the court is of the view that both the examination carried out and the report drawn up by the psychologist are of adequate quality and expertise. ...

8.6 It appears from the ... findings of both experts that the convicted person is still suffering from a disorder, namely an antisocial personality disorder. The court deduces from the findings that this disorder has a negative bearing on the risk of recidivism and hampers possible reintegration into society. The court further considers that the nature of the offence committed by the convicted person – the killing of a six-year-old girl for the sole purpose of hurting her aunt, his former girlfriend – is bizarre and, as was concluded at the time, must be attributed to the psychopathically disturbed personality of the convicted person. The court notes that important aspects of that disturbed personality, such as the antisocial personality, the limited development of his conscience and the lack of empathy, are currently still present. No treatment has taken place during the period of detention. It is furthermore not the case, as would be customary within the framework of treatment, that the circumstances which led him to his deed have been discussed with him so that he might subsequently have acquired an insight into how to avoid or defy such circumstances. In the case of the convicted person it would have been expected that in the course of such discussions his relationship with women and the question of dealing with rejection would have been addressed. As already mentioned, no such discussions or treatment have taken place. Also, at the hearing the convicted person did not demonstrate that he was capable of holding himself to account for the seriousness and absurdity of the murder or of understanding how he was able to commit it.

8.7 The foregoing leads the court to conclude that the risk of the convicted person's reoffending if he were released is such that the protection of society should prevail. This is not altered by the fact that the convicted person has been functioning well and without problems in prison in recent years. After all, and just as the experts have pointed out, prison life is very structured and circumstances such as those under which the convicted person committed his crime are absent there. Such circumstances may

occur outside the prison and – having regard to the aforementioned personality and the fact that no treatment has taken place – the court considers the risk of the convicted person's reoffending if confronted with such circumstances to be too great.

8.8 The court further takes the position of the victim's relatives into account. It has been sufficiently established that conditional release would at the present time entail adverse psychological consequences for them. The court observes in this connection that over the years the relatives have also not been provided with adequate support to help them come to terms with their grief or, if necessary, with treatment for their psychological problems. It is therefore easily understandable that they are very shocked now that the possibility of the convicted person's conditional release is being considered for the first time. In this context the court attaches relevance to the fact that after he committed his crime the convicted person threatened to harm the relatives and in this way contributed to their sense of insecurity. The convicted person has not demonstrated that he has any insight into the consequences of his deed or his subsequent actions.

8.9 On the basis of the foregoing, the court is of the opinion that the continued execution of the life sentence still serves a reasonable purpose. The court will accordingly not proceed to order the conditional release of the convicted person.

8.10 Having regard to the foregoing the court also perceives no cause to adjourn its examination pending further investigations, as requested by the defence as an alternative course of action.

8.11 The court adds that it is aware of the fact that its considerations as set out under points 8.6 and 8.7 would appear to offer little prospect of release in the future, as this would imperatively require that in the coming period some form of treatment should take place in which, in any event, aspects such as crime analysis, relationships and rejection would need to be addressed. Perhaps such treatment can be organised in some way in the [prison in Aruba]. The court further considers that the position of the relatives may also be different at the time of a subsequent review if they continue to receive the necessary support in dealing with their feelings of mourning, anger and fear.

8.12 The court finally notes that it has also had regard to the commotion which the possibility of a conditional release has caused in society and which has appeared from the submitted newspaper articles and the considerable public interest. A large part of the community perhaps thinks that the perpetrator of a crime such as the murder of [the victim] should never be allowed to regain his liberty. In the court's examination this has not, however, played a decisive role. After all, society's need for retribution should be considered to have been sufficiently assuaged after a period of detention of more than thirty-three years. As noted above, the aim of the continuation of that sentence is currently no longer retribution but the protection of society against possible recidivism.

9. The decision

The court:

does not proceed to order the convicted person's – conditional – release."

F. The applicant's mental condition and the psychiatric and psychological help provided or recommended

1. Psychiatric report of 11 October 1979

33. In the course of the criminal proceedings against him and at the request of the public prosecutor, the applicant was examined by psychiatrist J.N.S. in order to assess whether he could be held criminally responsible for the offence with which he was charged. The psychiatrist produced a 27-page report on 11 October 1979. The First Instance Court's judgment of 31 October 1979 includes a summary of the conclusion and advice contained in that report (see paragraph 12 above). The conclusion and advice as set out in the psychiatrist's report, reads, in so far as relevant, as follows:

> "Conclusion: In view of the above the Rapporteur reaches the following structure diagnosis: Serious criminal behaviour in the shape of a murder committed as a result of a primitive and primary outburst of emotions, by a retarded, infantile and narcissistic young man whose character structure has a serious disturbance of a psychopathiform nature.
>
> Advice: The Rapporteur should wish to present his advice on the basis of the following questions:
>
> 1. Is the accused suffering from a pathological disturbance and/or an inadequate development of his mental faculties?
>
> Reply: Yes, he certainly is, and in particular from a very inadequate development of his mental faculties.
>
> 2. Was this disturbance and/or inadequacy already present at the time of the offences with which he is charged?
>
> Reply: The inadequate development in particular has been present all his life, and therefore also at the time of the offences with which he is charged, although it may be said that everything had accelerated rapidly at that time.
>
> 3. If so, was this the case to such an extent that the accused, were he to be found guilty of the offences, should generally be considered, in the current state of Netherlands Antillean society, as not responsible for them or only to a greater or lesser extent?
>
> Reply: The Rapporteur would wish to conclude that the accused, having regard to the replies under 1. and 2., should be considered as having diminished criminal responsibility, but he nevertheless still considers that the accused is for the most part responsible for the acts, if they are found proven, which he has committed. The Rapporteur should especially wish to conclude that he would not call the accused insane, either before, during or after the offence; ... the accused has never withdrawn into a bizarre and mad world of his own but has always lived in a primitive, primary sensory world and he has succeeded, whenever his existence was not under stress, to participate in society to a reasonable extent.
>
> 4. At the time of the offences, did he have the insight to realise that committing them was morally reprehensible and would not be tolerated by society?

Reply: According to the Rapporteur he must have had such insight, but he subsequently completely suppressed and replaced it by a fantasy in view of the threat of destruction of his own personality structure.

5. If he did have such insight, would he have been capable of determining his will and his actions accordingly?

Reply: See the reply to question 4. Also partly because of that, the Rapporteur has reached a conclusion of diminished criminal responsibility.

6. Can it be expected that the accused might commit the same offence again or disrupt public order in a different manner?

Reply: Having regard to what has been written and concluded above, the accused is certainly capable of committing a similar act or of causing a different disruption of public order.

7. Does his mental state require that the accused be committed to a lunatic asylum?

Reply: In view of the reply to question 3 it may be said that this is not necessary.

8. What practical guidelines can you give and/or what proposals that are feasible in present-day society can you make in order to improve or bring about a recovery and/or a better development of the accused?

Reply: In view of the replies under 1, 2, 3, 6 and 7 my advice would be that the accused should be committed to a mental asylum where, certainly, during a fairly long period institutional treatment under very strict surveillance ought to take place. On Curaçao we have the choice only between prison and the national psychiatric hospital. Taking into consideration that for the time being the risk of recidivism is very great, even if treatment were to be commenced immediately, and that intensive surveillance is consequently of primordial importance (such surveillance being impossible in the national psychiatric hospital!) as well as the fact that the accused is not to be considered insane within the meaning of the law, admission to the national psychiatric hospital is wholly contra-indicated. The sole option remaining is for the accused, should he be found guilty of the offences with which he has been charged, to undergo his sentence in prison (a transfer to, for example, a mental asylum in the Netherlands is in my opinion not possible because of the accused's limited intelligence and insufficient ability to express himself verbally). The Rapporteur strongly advises that, if possible, attempts should be made in the prison setting to attain a stronger personality structure in order to avoid recidivism in the future."

2. Letter of 6 September 1991

34. On 6 September 1991 psychiatrist Dr M. de O. wrote to the Curaçao Procurator General in relation to the applicant's wish to be transferred to Aruba. She stated that the applicant had been placed under psychiatric observation upon his arrival in the remand centre in Curaçao and that good contact of a therapeutic nature had been established with a view to his rehabilitation. The psychiatrist expressed her opinion that from a psychological point of view a transfer to Aruba would benefit the applicant's rehabilitation.

3. Report of 10 February 1994

35. This psychiatric report was drawn up by P.N. van H. at the request of the Advocate General of Curaçao in relation to the applicant's request to be transferred to Aruba. The psychiatrist found that the applicant was not suffering from any psychosis, depression or anxiety, but that he did have a serious narcissistic personality disorder. He concluded that there was no psychiatric reason why the applicant could not be transferred to Aruba, and that, psychologically, such a transfer would probably be favourable for the applicant as his family was living there.

4. Reports drawn up for the purpose of the periodic review

36. In anticipation of the periodic review of life sentences to be introduced in the Curaçao Criminal Code, the Procurator General, in a letter of 9 September 2011, requested a psychiatric examination of the applicant.

37. On 7 October 2011 psychologist J.S.M. stated as follows:

> "... the results of the test show that [the applicant] is suffering from symptoms of depression. He pents up his emotions and anger and hides them from those around him. ... [The applicant] has little trust in other people. In his opinion people use and abuse each other in order to achieve their goals. That is why he is very distrustful of the people he encounters and displays antisocial behaviour. ... He is extremely sensitive to criticism and rejection.
>
> ...
>
> [The applicant] has been detained for a very long time, and as a result his feeling of well-being has deteriorated. His social skills have similarly deteriorated and he has given up hope of his situation undergoing any change, which has resulted in [the applicant] having to cope with very negative and depressive feelings about himself and others.
>
> [The applicant] requires support as regards his bottled-up negative and depressive feelings and in order to improve his general well-being.
>
> My advice as regards a pardon is not to give [the applicant] false hope and to be clear about the aspects of his case.
>
> If a pardon is applicable, it is recommended that [the applicant] follow a rehabilitation and social skills programme and that he be provided with support both inside and outside the KIA in order to promote his independence and functioning in society."

38. On 26 March 2012 the Aruban Foundation for Probation, Social Rehabilitation and the Protection of Juveniles (*Stichting Reclassering en Jeugdbescherming*) issued a report, in which it was noted that the applicant could live with his mother on Aruba and could work in an upholstery shop. The person who drew up the report found it difficult to estimate the risk of recidivism, but considered that with appropriate support following release his prospects of successfully integrating in society were good.

39. At the request of the Joint Court of Justice three reports were issued.

40. The first of these reports, which was issued by the KIA on 25 May 2012, included the following:

> "[The applicant] is a calm, quiet man of 59 who has never been given a disciplinary punishment during his detention. ... He carries out his duties adequately and to the satisfaction of prison staff. In principle he works alone, but is occasionally willing to train other inmates in upholstery work. ... He is always polite and respectful towards prison staff; none of them have complaints about him. He rarely has any contact with the social worker and if he does, he always asks the same questions. It is as if he forgets matters which have already been discussed."

41. The second report was drawn up on 21 July 2012 by psychiatrist M.V., who concluded as follows:

> "The personality test showed that the subject has an antisocial personality disorder with mild psychopathic features. There are also signs of narcissistic features. The character structure is rigid, but is not strongly displayed, perhaps because of his age. The risk that he will reoffend or get into trouble in some other way upon return to society is considered to be present (moderate risk in comparison with the forensic population). ... In general the subject can be described as having an antisocial personality whose more unpleasant manifestations have been mitigated. ... It is reasonably certain that his personality will not change. Personality is formed up to age 35, after which only small changes take place. The examination shows that the subject's personality profile is fairly rigid. He will therefore always be a fairly unpleasant person in his relations with others and will always have difficulty in establishing and maintaining social contacts. Given his personality, I estimate the chances of successful integration in society to be small."

42. The third report requested by the Joint Court of Justice was compiled by psychiatrist G.E.M. on 17 August 2012, in which the following was concluded:

> "The subject is, however, suffering from a severe antisocial personality disorder, characterised by a highly undifferentiated, fairly primitive emotional awareness, an underdeveloped conscience, rudimentary social skills, a lack of empathy. ... Although the subject displayed problematic and aggressive behaviour during the first few years of his detention, even including an attempt at poisoning, he has practically been a model prisoner over the last few years. ... This change in behaviour is largely attributable to the structure provided by the prison setting and the fact that he is much older now (almost 60) and is likely to become more and more moderate as the years go by. ... [A]s to the risk of recidivism: I am in two minds. Whereas the subject is almost a model prisoner, his character traits have not in essence changed. He continues to be a person with a serious disability. It remains in doubt how he will react and to what extent he can survive once the structure offered by the prison is no longer in place."

5. Psychiatric help after the periodic review

43. Following up the decision of 21 September 2012 given by the Joint Court of Justice, the Public Prosecution Service in Curaçao concluded that more structured contact with a psychiatrist would be desirable. For this reason, the Procurator General of Curaçao asked his counterpart in Aruba to ensure that the applicant received regular visits from a psychiatrist who

would counsel him on the basis of a treatment plan, in so far as this could be done within the constraints of the enforcement of his life sentence.

6. Documents drawn up after the applicant had been granted a pardon

44. A document entitled "Psychological Report" was drawn up by the Aruba prison's psychologist J.S.M. (who had reported on the applicant for the purposes of the periodic review; see paragraph 37 above) on 24 July 2014, apparently at the request of the applicant's representative. The psychologist stated that she had conducted a psychological test and an interview with the applicant, at a time (2011) when she had only been working at the prison for a few months. She had no knowledge of what had been offered to the applicant prior to that. The short time during which she had had experience of the applicant was insufficient for her to produce a support plan or to execute such a plan.

45. A second document entitled "Psychological Report" was drawn up by the same psychologist on 1 September 2014, at the request of the Government. Apart from one sentence, this report is identical to the report of 24 July 2014. The sentence in question states that, after consulting the applicant's medical file, the psychologist declared that no psychological or psychiatric treatment of the applicant had taken place.

46. In an email of 29 July 2014 to the applicant's representative, the senior social worker in the Aruba prison stated that there was nothing in the prison's medical file on the applicant, who had been transferred to Aruba in 1999, to suggest that he had undergone any treatment by a psychiatrist or a psychologist. The KIA had employed a psychologist in 2011 but she had not treated or supported the applicant. The applicant had visited the social work department of the prison with some regularity in order to talk or to organise practical matters.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Custodial sentences

47. The applicant was found guilty of the offence set out in Article 302 of the Criminal Code of the Netherlands Antilles (*Wetboek van Strafrecht van de Nederlandse Antillen*), which provided at the relevant time:

> "Anyone who deliberately and with premeditation takes the life of another will be punished as guilty of murder with imprisonment for life or for a temporary period not exceeding twenty years."

48. Article 17 of the National Ordinance on Prisons (*Landsverordening Beginselen Gevangeniswezen*), which entered into force in 1999 and was incorporated as part of the legislation of Curaçao when it became an

autonomous country on 10 October 2010 (see paragraph 9 above), provides as follows, in so far as relevant:

> "While maintaining the character of the custodial sentence ..., the execution thereof shall also serve to prepare the persons concerned for their return to society."

B. Pardons in Curaçao

49. The power to grant a pardon lies with the Governor. Before 10 October 2010, this was regulated in Article 16 § 1 of the Constitution (*Staatsregeling*) of the Netherlands Antilles, which stipulated:

> "The Governor may, having consulted the court which handed down the judgment, grant a pardon to any person convicted and sentenced by judgment of the courts."

50. As of 10 October 2010 Article 93 of the Curaçao Constitution provides as follows:

> "Pardons will be granted by country decree after the court which handed down the judgment has been consulted, taking into account provisions to be laid down by or pursuant to country ordinance."

Such country decrees are issued by the Governor.

51. The pardons procedure applicable to people serving life sentences in Curaçao is practically the same as that which used to apply in the former Netherlands Antilles. Pardons are granted in accordance with the Pardons Decree 1976 (*Gratieregeling 1976*; an Order in Council for the Kingdom (*Algemene Maatregel van Rijksbestuur*), which entered into force in the Netherlands Antilles on 1 October 1976 and which was incorporated as part of the legislation of Curaçao when it became an autonomous country on 10 October 2010 (see paragraph 9 above)). The procedure is the same for all convicted persons, whether serving a life sentence or a determinate sentence.

52. A petition for pardon can be filed in writing by the sentenced person or his or her counsel. It should in principle be filed with the Governor of the country of the Kingdom where the person in question was convicted. If a sentenced person is transferred to another country of the Kingdom to serve a sentence imposed in Curaçao, the rules and procedures applicable to pardons in that country apply in principle, unless otherwise agreed when the sentenced person is transferred (as in the present case: the rules and procedures applicable to pardons in Curaçao continued to apply to the applicant after his transfer to Aruba).

53. When a pardon petition is received, it is submitted to the court which handed down the judgment for advice, being the Joint Court of Justice in the present case. In its turn, the Joint Court of Justice is advised by the Procurator General of the Public Prosecution Service. The Procurator General decides what information is required, such as a probation report. This may be prompted, for example, by reports from the custodial

institution indicating that the prisoner's behaviour has changed. Where appropriate, a behavioural expert may also be consulted but psychological or psychiatric examination is not compulsory.

54. On the basis of its own findings and the recommendations of the Public Prosecution Service, a panel of three judges issues reasoned advice to the Governor, who ultimately decides whether to grant or deny the petition. Besides the punishment aspect and the gravity of the offence, other aspects such as the age of a person serving a life sentence may play a role. The danger that the person poses to society is also an important consideration when deciding whether or not to grant a pardon. If a pardon is granted, the sentence may be remitted, reduced or commuted. The Pardons Decree 1976 does not contain a provision requiring the Governor to provide reasons for his or her decision on a pardon request. However, the Explanatory Memorandum (*Memorie van Toelichting*) to Article 93 of the Curaçao Constitution states that if a pardon is granted contrary to the advice of the court, the reasons for this decision must be explicitly set out in the country decree.

C. Periodic review of life sentences

55. As of 15 November 2011 periodic reviews of life imprisonment sentences are required on Curaçao. Article 1:30 of the Curaçao Criminal Code provides:

> "1. Any convicted person sentenced to life imprisonment will be released on parole after the deprivation of liberty has lasted at least twenty years if in the opinion of the [Joint] Court [of Justice] further unconditional execution no longer serves any reasonable purpose.
>
> 2. The [Joint] Court [of Justice] will in any event take into account the position of any victim or surviving close relatives and the risk of recidivism.
>
> 3. If the [Joint] Court [of Justice] decides not to release the person in question, it will review the situation again after five years and if necessary every five years thereafter.
>
> ...
>
> 7. No legal remedy lies against the decision of the Joint Court of Justice."

56. The Explanatory Memorandum in respect of this provision provides *inter alia* as follows:

> "The execution of a custodial sentence that gives no hope of returning to society can result in an inhuman situation. Reference can be made to the opinion of the Supreme Court ... of 28 February 2006, LJN (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number]) AU9381. At a lecture at the University of the Netherlands Antilles on 13 April 2006 ... professor of criminal law D.H. de Jong proposed a periodic review of life imprisonment sentences. Such would also be in accordance with the approach of the European Court of Human Rights which *inter alia* in *Wynne v. the United Kingdom* (judgment of 18 July 1994, [Series A no. 294-A]; a case that

does not directly coincide with our life imprisonment sentence) held that a periodic review is required depending on 'the nature and purpose of the detention in question, viewed in the light of the objectives of the sentencing court.'

In response to this, this provision [i.e. Article 1:30 of the Criminal Code] imposes the obligation on the [Joint Court of Justice] to re-examine the position of the person sentenced to life imprisonment after twenty years and if necessary every five years thereafter. We are aware that this resembles the regulation of pardons but would emphatically stress that this procedure does not affect the possible granting of a pardon according to the normal procedure. The aim of the procedure [provided for in Article 1:30] is to prevent the execution of the life imprisonment sentence automatically or for improper reasons leading to a life without hope for the persons concerned. Naturally the interests of the sentenced person should be weighed against the interests of society, and in particular the position of the relatives of the victim or of the victims themselves needs to be taken into account. The second paragraph [of Article 1:30] refers to the risk of recidivism; it is obvious that the [Joint] Court [of Justice] will for this purpose let itself be informed by a behavioural expert."

III. RELEVANT INTERNATIONAL AND EUROPEAN MATERIALS

A. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Aruba and the Netherlands Antilles in 2007

57. A delegation of the CPT visited Aruba from 4 to 7 June 2007 and the Netherlands Antilles from 7 to 13 June 2007. The relevant parts of the CPT's report (CPT/Inf (2008) 2) of 5 February 2008 read as follows:

"PART II: VISIT TO ARUBA

...

C. <u>Aruba Correctional Institute – KIA</u>

...

3. Conditions of detention

...

b. regime

69. Two prisoners were serving <u>life sentences</u> at the time of the visit, and 26 inmates were serving <u>long sentences</u> of 10 to 22 years duration. Yet such prisoners, who formed over 12% of the sentenced prisoners, did not appear to benefit from a richer regime than the rather meagre one on offer to all prisoners; nor did they benefit from adequate psychological support.

... **The CPT recommends that the Aruban authorities develop a policy vis-à-vis life-sentenced and other long-term prisoners.**

f. psychiatric and psychological care

79. In principle, a psychiatrist attended KIA once a month; however, the delegation noted that he had not visited for several months. The lack of provision of psychiatric care was essentially a budgetary issue.

... A psychiatric and forensic observation and assistance centre (FOBA) within the prison, with a capacity to hold 10 prisoners, had recently been established. However, due to a shortage of staff, both medical and custodial, the FOBA had not been brought into service. In theory, prisoners could receive acute psychiatric treatment at the PAAZ Unit at Oduber Hospital, but resort to hospitalisation was very infrequent.

...

PART 3 VISIT TO THE NETHERLANDS ANTILLES

...

6. Health care services

...

b. psychiatric and psychological care at Bon Futuro Prison [in Curaçao]

60. A psychiatrist attended Bon Futuro Prison (apart from FOBA, ...) on a half-time basis. However, prisoners did not benefit from psychological care (one psychologist attended only the FOBA unit). In the CPT's view, an establishment of the size of Bon Futuro Prison should be able to rely on the services of at least one full-time psychologist. **The CPT recommends that a full-time psychologist be recruited as soon as possible for Bon Futuro Prison**.

61. The forensic psychiatric support unit (or FOBA) at Bon Futuro Prison was developed in order to cater for certain problematic prisoners in the absence of more appropriate hospital surroundings." [original emphasis]

B. Relevant international instruments on life sentences

1. Council of Europe texts

(a) Resolution (76) 2

58. Starting in 1976, the Committee of Ministers has adopted a series of resolutions and recommendations on long-term and life-sentence prisoners. The first is Committee of Ministers Resolution (76) 2 of 17 February 1976, which made a series of recommendations to member States. These included:

"1. pursue a criminal policy under which long-term sentences are imposed only if they are necessary for the protection of society;

2. take the necessary legislative and administrative measures in order to promote appropriate treatment during the enforcement of [long-term] sentences;

...

9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;

10. grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;

11. adapt to life sentences the same principles as apply to long-term sentences;

> 12. ensure that a review, as referred to in [paragraph] 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals;"

(b) Recommendation Rec(2003)23

59. Recommendation Rec(2003)23 (on the management by prison administrations of life-sentence and other long-term prisoners) was adopted by the Committee of Ministers on 9 October 2003. The recommendation's preamble states that:

> "the enforcement of custodial sentences requires striking a balance between the objectives of ensuring security, good order and discipline in penal institutions, on the one hand, and providing prisoners with decent living conditions, active regimes and constructive preparations for release, on the other ..."

Paragraph 2 of the recommendation goes on to state that the aims of the management of life sentence and other long term prisoners should be:

> "– to ensure that prisons are safe and secure places for these prisoners and for all those who work with or visit them;
>
> – to counteract the damaging effects of life and long-term imprisonment;
>
> – to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release."

Included in the recommendation's general principles for the management of such prisoners are: (i) the individualisation principle (that consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence), and (ii) the progression principle (that individual planning for the management of the prisoner's sentence should aim at securing progressive movement through the prison system) (see paragraphs 3 and 8 of the recommendation). The report accompanying the recommendation (prepared under the auspices of the European Committee of Crime Problems) adds that progression has as its ultimate aim a constructive transition from prison life to life in the community (paragraph 44 of the report).

Paragraph 10 (on sentence planning) provides that such plans should be used to provide a systematic approach, *inter alia*, to: progressive movement through the prison system from more to less restrictive conditions with, ideally, a final phase spent under open conditions, preferably in the community; and conditions and supervision measures conducive to a law-abiding life and adjustment in the community after conditional release.

Paragraph 16 provides that, since neither dangerousness nor criminogenic needs are intrinsically stable characteristics, risk and needs assessments should be repeated at intervals.

Finally, paragraphs 33 and 34 (on managing reintegration into society) provide:

"33. In order to enable life sentence and other long-term prisoners to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community, their release should be prepared well in advance and take particular account of the following:

– the need for specific pre-release and post-release plans which address relevant risks and needs;

– due consideration of the possibility of achieving release and the continuation post-release of any programmes, interventions or treatment undertaken by prisoners during detention;

– the need to achieve close collaboration between the prison administration and post-release supervising authorities, social and medical services.

34. The granting and implementation of conditional release for life sentence and other long-term prisoners should be guided by the principles set out in Recommendation Rec(2003)22 on conditional release."

In respect of paragraph 34, the report accompanying the recommendation states (at paragraph 131):

"Recommendation Rec(2003)22 contains the principle that conditional release should be possible for all prisoners except those serving extremely short sentences. This principle is applicable, under the terms of the Recommendation, even to life prisoners. Note, however, that it is the possibility of granting conditional release to life prisoners that is recommended, not that they should always be granted conditional release."

(c) Recommendation Rec(2003)22

60. Recommendation Rec(2003)22 (on conditional release) was adopted by the Committee of Ministers on 24 September 2003. It is summarised at length in *Kafkaris v. Cyprus* ([GC], no. 21906/04, § 72, ECHR 2008). In sum, it provides a series of recommendations governing preparation for conditional release, the granting of it, the conditions which may be imposed and procedural safeguards. Among its general principles are paragraphs 3 and 4(a), which provide:

"3. Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.

4.a. In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners."

The Explanatory Memorandum accompanying the Recommendation states in respect of paragraph 4:

"Life-sentence prisoners should not be deprived of the hope to be granted release either. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of persons who have no hope of release poses severe management problems in terms of creating incentives to

> co-operate and address disruptive behaviour, the delivery of personal-development programmes, the organisation of sentence-plans and security. Countries whose legislation provides for real-life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures."

(d) CPT Working document on Actual/Real Life Sentences

61. A report on "Actual/Real Life Sentences", prepared by a member of the CPT, Mr Jørgen Worsaae Rasmussen, (CPT (2007) 55, 27 June 2007), reviewed various Council of Europe texts on life sentences, including Recommendations Rec(2003)22 and Rec(2003)23, and stated in terms that: (a) the principle of making conditional release available is relevant to all prisoners, "even to life prisoners", and (b) that all Council of Europe member States had provision for compassionate release but that this "special form of release" was distinct from conditional release.

It noted the view that discretionary release from imprisonment, as with its imposition, was a matter for the courts and not the executive, a view which had led to proposed changes in the procedures for reviewing life imprisonment in Denmark, Finland and Sweden. The document also quoted with approval the CPT's report on its 2007 visit to Hungary in which it stated:

> "[A]s regards 'actual lifers', the CPT has serious reservations about the very concept according to which such prisoners, once they are sentenced, are considered once and for all as a permanent threat to the community and are deprived of any hope to be granted conditional release."

The document's conclusion included recommendations that: no category of prisoners should be "stamped" as likely to spend their natural life in prison; no denial of release should ever be final; and not even recalled prisoners should be deprived of all hope of release.

(e) CPT report on Switzerland

62. The CPT's report on its visit to Switzerland from 10-20 October 2011 (25 October 2012 CPT/Inf (2012) 26) contained the following observations on the Swiss system of life imprisonment where a sex or violent offender is regarded as extremely dangerous and his or her condition is assessed as untreatable:

> "The CPT has serious reservations as to the concept of confinement 'for life', according to which these people, once they have been declared highly dangerous and untreatable, are considered once and for all as presenting a permanent danger to society and are thus formally deprived of all hope of a more lenient enforcement of the sentence or even conditional release. Since the only way the person concerned can be released is through scientific advances, he or she is deprived of any ability to influence his eventual release, for example, by good behaviour in the course of the sentence.

In this respect, the CPT refers to Recommendation (2006) 2 of the Committee of Ministers of 11 January 2006, on the European Prison Rules, as well as paragraph 4(a) of Recommendation (2003) 22 of the Committee of Ministers of 24 September 2003, concerning conditional release, which indicates clearly that the law should allow for the possibility of all convicted prisoners, including those serving a life sentence, benefiting from conditional release. The Explanatory Memorandum to the latter insists that life prisoners should not be deprived of all hope of release.

The CPT considers therefore that it is inhuman to imprison someone for life without any real hope of release. The Committee strongly urges the Swiss authorities to re-examine the concept of detention 'for life' accordingly." [original emphasis]

2. International criminal law

63. Article 77 of the Rome Statute of the International Criminal Court (ICC) allows for the imposition of a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. Article 110(3) provides that when a person has served twenty-five years of a sentence of life imprisonment, the ICC shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time. Article 110(4) and (5) provide:

"4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence."

The procedure and further criteria for review are set out in Rules 223 and 224 of the Rules of Procedure and Evidence.

Rule 223 provides:

"Criteria for review concerning reduction of sentence

In reviewing the question of reduction of sentence pursuant to article 110, paragraphs 3 and 5, the three judges of the Appeals Chamber shall take into account the criteria listed in article 110, paragraph 4 (a) and (b), and the following criteria:

(a) The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime;

(b) The prospect of the resocialisation and successful resettlement of the sentenced person;

(c) Whether the early release of the sentenced person would give rise to significant social instability;

(d) Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release;

(e) Individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age."

Rule 224(3) provides that, for the application of Article 110(5) of the Statute, three judges of the Appeals Chamber shall review the question of reduction of sentence every three years, unless a shorter interval was established in the decision taken pursuant to Article 110(3). Rule 224(3) also provides that, in case of a significant change in circumstances, those three judges may permit the sentenced person to apply for a review within the three-year period or such shorter period as may have been set by the three judges.

64. Article 27 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides that sentences of imprisonment shall be served in a State designated by the International Tribunal. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal. Article 28 (on pardon or commutation of sentences) provides:

"If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law."

Similar provisions to Articles 27 and 28 of the ICTY Statute are contained in the Statute of the International Criminal Tribunal for Rwanda (Articles 26 and 27), the Statute of the Special Court for Sierra Leone (Articles 22 and 23), and the Statute of the Special Tribunal for Lebanon (Articles 29 and 30).

3. European Union law

65. Article 5(2) of the Framework Decision of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States provides:

"if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency

to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure."

C. Relevant European instruments on (mental) health care for prisoners

66. Recommendation No. R (98) 7 of the Committee of Ministers of the Council of Europe to the member States concerning the ethical and organisational aspects of health care in prison, which was adopted on 8 April 1998, in its relevant parts, reads as follows:

"I. Main characteristics of the right to health care in prison

A. Access to a doctor

1. ... All detainees should benefit from appropriate medical examinations on admission. Special emphasis should be put on the screening of mental disorders, ...

3. A prison's health care service should at least be able to provide outpatient consultations and emergency treatment. When the state of health of the inmates requires treatment which cannot be guaranteed in prison, everything possible should be done to ensure that treatment is given, in all security, in health establishments outside the prison.

...

5. Access to psychiatric consultation and counselling should be secured. There should be a psychiatric team in larger penal institutions. If this is not available as in the smaller establishments, consultations should be assured by a psychiatrist, practising in hospital or in private.

...

III. The organisation of health care in prison with specific reference to the management of certain common problems

D. Psychiatric symptoms, mental disturbance and major personality disorders, risk of suicide

55. Prisoners suffering from serious mental disturbance should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. The decision to admit an inmate to a public hospital should be made by a psychiatrist, subject to authorisation by the competent authorities."

67. The Appendix to Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life-sentence and other long-term prisoners, adopted on 9 October 2003, provides, *inter alia*, as follows:

"27. Action should be taken to allow for an early and specialist diagnosis of prisoners who are, or who become, mentally disturbed and to provide them with adequate treatment. ..."

68. The Committee of Ministers underlined in its Recommendation Rec(2006)2 to member States on the European Prison Rules, adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, that:

> "... the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ensuring prison conditions which do not infringe human dignity and which offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their reintegration into society."

69. It therefore recommended that member States, *inter alia*, be guided in their legislation, policies and practice by the rules contained in the appendix to the recommendation, the relevant parts of which read as follows:

> "...
>
> 12.1 Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose.
>
> 12.2 If such persons are nevertheless exceptionally held in prison there shall be special regulations that take account of their status and needs.
>
> ...
>
> 39. Prison authorities shall safeguard the health of all prisoners in their care.
>
> ...
>
> 40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
>
> 40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.
>
> 40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.
>
> ...
>
> 47.1 Specialised prisons or sections under medical control shall be available for the observation and treatment of prisoners suffering from mental disorder or abnormality who do not necessarily fall under the provisions of Rule 12.
>
> 47.2 The prison medical service shall provide for the psychiatric treatment of all prisoners who are in need of such treatment and pay special attention to suicide prevention."

D. Relevant international instruments on the rehabilitation of prisoners

70. Criminologists have referred to the various functions traditionally assigned to punishment, including retribution, prevention, protection of the public and rehabilitation. However, in recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of resocialisation through the fostering of personal responsibility. This objective is reinforced by the

development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.

1. Relevant international human rights' instruments

71. Article 10(3) of the International Covenant on Civil and Political Rights ("the ICCPR") provides that the "penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation". The General Comment of the Human Rights Committee on Article 10 further states that "no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner".

72. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) contains specific provisions on sentenced prisoners, including the following guiding principles:

> "57. Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.
>
> 58. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.
>
> 59. To this end, the institution should utilise all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners."

2. European Prison Rules 1987 and 2006

73. The European Prison Rules are recommendations of the Committee of Ministers to member States of the Council of Europe as to the minimum standards to be applied in prisons. States are encouraged to be guided in legislation and policies by those rules and to ensure wide dissemination of the Rules to their judicial authorities as well as to prison staff and inmates.

The 1987 version of the European Prison Rules ("the 1987 Rules") notes, as its third basic principle, that:

> "The purposes of the treatment of persons in custody shall be such as to sustain their health and self-respect and, so far as the length of sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will assist them to return to society with the best chance of leading law-abiding and self-supporting lives after their release."

The latest version of those Rules adopted in 2006 ("the 2006 Rules") replaces this above-cited principle with three principles:

> "Rule 2: Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
>
> ...
>
> Rule 5: Life in prison shall approximate as closely as possible the positive aspects of life in the community.
>
> Rule 6: All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty."

The commentary on the 2006 Rules (prepared by the European Committee on Crime Problems – "the CDPC") notes that Rule 2 emphasises that the loss of the right to liberty should not lead to an assumption that prisoners automatically lose other political, civil, social, economic and cultural rights: in fact restrictions should be as few as possible. Rule 5, the commentary observes, underlines the positive aspects of normalisation recognising that, while life in prison can never be the same as life in a free society, active steps should be taken to make conditions in prison as close to normal life as possible. The commentary further states that Rule 6 "recognises that prisoners, both untried and sentenced, will eventually return to the community and that prison life has to be organised with this in mind."

74. The first section of Part VIII of the 2006 Rules is entitled "Objective of the regime for sentenced prisoners" and provides, *inter alia*, as follows:

> "102.1 In addition to the rules that apply to all prisoners, the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life.
>
> 102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment."

In these respects, the CDPC commentary explains that Rule 102:

> "... states the objectives of the regime for prisoners in simple, positive terms. The emphasis is on measures and programmes for sentenced prisoners that will encourage and develop individual responsibility rather than focussing narrowly on the prevention of recidivism. ...
>
> The new Rule is in line with the requirements of key international instruments including Article 10(3) of the [ICCPR], ... However, unlike the ICCPR, the formulation here deliberately avoids the use of the term, 'rehabilitation', which carries with it the connotation of forced treatment. Instead, it highlights the importance of providing sentenced prisoners, who often come from socially deprived backgrounds, the opportunity to develop in a way that will enable them to choose to lead law-abiding lives. In this regard Rule 102 follows the same approach as Rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners."

75. Rule 105.1 of the 2006 Rules provides that a systematic programme of work shall seek to contribute to meeting the objective of the prison regime. Rule 106.1 provides that a systematic programme of education, with the objective of improving prisoners' overall level of education, as well as the prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners. Finally, Rule 107.1 requires that the release of sentenced prisoners should be accompanied by special programmes enabling them to make the transition to a law-abiding life in the community.

76. The reason for the evolution towards the 2006 Rules can be understood through the two Committee of Ministers Recommendations Rec(2003)22 and Rec(2003)23 mentioned above (see paragraphs 60 and 59), both of which address the rehabilitative dimension of prison sentences. In addition to the relevant provisions of these recommendations, already cited above, it is to be noted that the fifth paragraph of the preamble of Recommendation Rec(2003)22 on conditional release states that "research has shown that detention often has adverse effects and fails to rehabilitate offenders". The Recommendation outlines (paragraph 8) the following measures to reduce recidivism, by the imposition of individualised conditions such as:

> "– the payment of compensation or the making of reparation to victims;
>
> – entering into treatment for drug or alcohol misuse or any other treatable condition manifestly associated with the commission of crime;
>
> – working or following some other approved occupational activity, for instance, education or vocational training;
>
> – participation in personal development programmes; and
>
> – a prohibition on residing in, or visiting, certain places."

THE LAW

I. PRELIMINARY ISSUES

A. The Government's preliminary objections

1. Locus standi

(a) The parties' submissions

77. At the hearing, the Government expressed doubts as to whether the applicant's son, Mr Johnny Francis van Heyningen, and his sister, Ms Altagracia Murray, had *locus standi* to pursue the application. If the Court required the existence of additional personal interests other than a

close blood-relationship, as its case-law suggested, the Government submitted that it appeared that the applicant had not shown much interest in any of his three children and that the file in possession of the Government did not show that Mr van Heyningen had ever visited the applicant during his detention. While this was different for the applicant's sister Altagracia, who had kept in contact with her brother during the second part of his detention in Aruba, the Government questioned whether, in a situation where an applicant's closest blood-relatives, namely his children, had never had any contact with their father or showed no interest in pursuing the application, it fell to another relative to come forward.

78. The applicant's son and sister argued that they had a legitimate interest in pursuing the application so as to obtain a ruling from the Court on, in particular, the question whether the authorities had been under an obligation to create a *de facto* prospect of release for the applicant. In their view, the Government had failed to provide the applicant with adequate treatment in order to help him regain his liberty, reunite with his family and restore family ties. Despite the costs involved, Mr van Heyningen, who had been living in the European part of the Kingdom since 1999, had managed to visit his father in prison six times and had also maintained contact with him by telephone. Ms Altagracia Murray, who was living in Aruba, had visited her brother in prison there nearly every week.

(b) The Court's assessment

79. The Court normally permits the next-of-kin to pursue an application, provided he or she has a legitimate interest, where the original applicant died after lodging the application with the Court (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII, and *Larionovs and Tess v. Latvia* (dec.), nos. 45520/04 and 19363/05, § 172, 25 November 2014). Having regard to the subject matter of the application and all the elements in its possession, the Court considers that the applicant's son and sister have a legitimate interest in pursuing the application and that they thus have the requisite *locus standi* under Article 34 of the Convention (see, for example, *Carrella v. Italy*, no. 33955/07, §§ 48-51, 9 September 2014).

80. Therefore, and to the extent that the Government's remarks are to be understood as a preliminary objection concerning the *locus standi* of the applicant's son and sister, the Court accordingly dismisses that objection.

2. Victim status

81. The Government posited that as regards the applicant's complaint that he had no prospect of release and that the pardon option was inadequate and ineffective, the applicant could no longer be considered a "victim" of a violation of Article 3 of the Convention, within the meaning of Article 34, since he had been released from prison after a request for pardon had been granted on 31 March 2014.

82. The applicant did not address this issue.

83. It is the settled case-law of the Court that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012, with further references).

84. The Court observes, in relation to the applicant's complaint about the pardon system not providing him with a prospect of release, that during the 33 years that he spent in prison following the imposition of the life sentence he unsuccessfully applied for a pardon on many occasions. While it is true that he was ultimately granted a pardon on 31 March 2014 for reasons relating to his deteriorating health (see paragraph 30 above), that decision did not comprise an acknowledgment of the alleged violation of Article 3 of the Convention. As there is, moreover, no indication of the pardon having been granted as a means of offering redress, the applicant may claim to have been the victim of the violations of the Convention alleged by him.

Consequently, the Court dismisses the Government's objection as to the applicant's lack of victim status.

B. Scope of the case before the Grand Chamber

85. In the specific circumstances of the present case the Court considers that there is reason to address the issue of the exact scope of the case before it in some detail.

86. Firstly, the applicant's request for referral and his written observations included submissions in relation to his complaints under Article 5 of the Convention, which had been declared inadmissible by the Chamber (see paragraph 4 above). However, according to the Court's settled case-law, the content and scope of the "case" referred to the Grand Chamber is delimited by the Chamber's decision on admissibility (see *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; and *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, § 194, 3 October 2008). This means that the Grand Chamber cannot examine those parts of the application which have been declared inadmissible by the Chamber. The Court sees no reason to depart from this principle in the

present case (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, §§ 59-62, ECHR 2007-I).

87. The applicant further submitted in his request for referral that because he had never received psychiatric treatment he could not foster any hope of one day being released. At the same time he "accepted" the Chamber's finding that, in view of the introduction of the periodic review mechanism in domestic law, there had been no violation of Article 3 of the Convention as regards his complaint that there was no possibility of a review of his life sentence.

88. In this connection the Court reiterates that the "case" referred to the Grand Chamber embraces all aspects of the application previously examined by the Chamber in its judgment (see *K. and T. v. Finland*, cited above, § 140). Moreover, it cannot be said that the applicant's remarks about the conclusion reached by the Chamber constitute an unequivocal withdrawal of the complaint at issue, given that in his written observations the applicant submitted argument on the question whether his life sentence was *de facto* reducible and whether the periodic review met the requirements set out in the Court's case-law. It thus appears that the applicant has not renounced this part of his complaint. Accordingly, it is open to the Grand Chamber to examine the complaint under Article 3 that there was no possibility of a review of the applicant's life sentence.

89. Finally, the applicant indicated in his written observations that he no longer wished "to insist" on his complaint under Article 3 relating to the physical conditions of his detention in so far as this concerned the allegedly inadequate conditions in prison buildings. Given that he stated in the following paragraph of those observations that he wanted to maintain his other complaints, the Court concludes that by "not insisting", the applicant meant that he did not wish to pursue this aspect of his Article 3 complaint within the meaning of Article 37 § 1 (a) of the Convention. Finding, in accordance with Article 37 § 1 *in fine*, that there are no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which require it to do so, the Grand Chamber will not therefore examine this complaint.

90. The Grand Chamber will accordingly examine the applicant's complaints under Article 3 that his life sentence was irreducible and that the conditions of his detention violated that provision, in particular in that he was never placed under a regime befitting his mental condition or provided with psychiatric treatment.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

91. The applicant initially complained that his life sentence was *de jure* and *de facto* irreducible and that there was no separate regime for life prisoners or a special regime for detainees with psychiatric problems in the

prisons where he had been held. In his letter of 2 November 2012 (see paragraph 3 above), following the conclusion of the periodic review of his life sentence, he further complained that even if a *de jure* possibility of conditional release had been created, *de facto* he had no hope of release as he had never been provided with any psychiatric treatment, and for that reason the risk of recidivism was deemed to be too high for him to be eligible for such release. He relied on Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The Chamber judgment

92. In its judgment of 10 December 2013, the Chamber examined separately the applicant's complaints under Article 3 of the Convention about the alleged irreducibility of his life sentence and about the conditions of his detention. As regards the former complaint it found that there had been no violation of Article 3. It noted the introduction in November 2011 – some twenty months after the application had been lodged – in national (i.e. Curaçao) law of a periodic review mechanism for such sentences and considered that this mechanism met the criteria set out in the Court's judgment in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09, 130/10 and 3896/10, §§ 119-122, ECHR 2013 (extracts)). It further observed that a review of the applicant's life sentence had indeed been carried out, in the course of which a number of expert reports had been drawn up. Taking into account the fact that the applicant had only lodged his application with the Court almost thirty years after his conviction, the Chamber saw no reason to examine whether or not the life sentence imposed on him had *de facto* and *de jure* been reducible prior to the introduction of the periodic review in 2011.

93. The Chamber further found that the conditions of the applicant's detention had not been incompatible with Article 3. As regards, in particular, the complaint that he had never been treated for his mental disorder, the Chamber noted that the applicant had been placed under psychiatric observation and had been offered help for his personality disorder in the prison in Curaçao, but that help had ended when he had been transferred, at his own request, to Aruba, where psychiatric treatment was not available to the same extent, even though psychiatric help had become available by the time of the Chamber's judgment. The Chamber observed, moreover, that the applicant had not submitted any information about whether or not he had availed himself of the assistance available, nor had he argued that such assistance had been inadequate for his needs.

B. The parties' submissions before the Grand Chamber

1. The applicant

94. The applicant argued that it appeared clearly from the judgment of the Joint Court of Justice of 11 March 1980 that that tribunal had chosen to impose a life sentence rather than a determinate prison sentence on him in view of his mental condition and dangerousness to society and of the absence, at that time, of a suitable institution where he could undergo the treatment recommended by the psychiatrist who had examined him and whose findings had been accepted by the Joint Court. He had subsequently spent more than thirty years in prison without ever receiving treatment – any psychiatric help he may have been offered was no more than the basic kind of assistance available in all prisons and could not be equated to treatment. Neither had the possibility of a transfer to the Netherlands, in order to receive treatment there, ever been envisaged. According to the applicant, it was unrealistic to expect him to have been able to recognise that he was in need of treatment and to raise this issue, as the Chamber had considered in its judgment; the necessity of treatment had, in any event, already been established and the authorities were aware of it.

95. The applicant maintained that the possibility of seeking a pardon did not qualify as a review as, *inter alia*, the procedure was not regulated by law and the Governor was under no obligation to provide reasons for a decision refusing a pardon. None of the pardon requests lodged by him had led to a psychological or psychiatric examination with a view to determining whether he continued to constitute a danger to society; nor had the prison authorities been asked to issue a report about him pursuant to any of his petitions for pardon. The introduction of the periodic review procedure, while offering a theoretical possibility of release, was ineffective in the circumstances of the applicant's case, since as long as he had not been provided with treatment, it could not lead to any conclusion other than that he was still too dangerous to be considered for a reprieve. In the applicant's view it was clear that without treatment he could never foster any hope of one day being released.

2. The Government

96. The Government maintained that the life sentence imposed on the applicant had been *de jure* and *de facto* reducible from the moment of its imposition, since he had had the option of seeking a pardon, which might be granted if it was demonstrated that the enforcement or continuation of a sentence did not reasonably serve any of the aims pursued through the application of the criminal law. Moreover, seven of the nine persons on whom a life sentence had been imposed in the Netherlands Antilles since 1980 had sought a pardon and in two instances, including the applicant's

case, a pardon request had been granted. According to the Government, this showed that even if pardons were granted only rarely, there was nevertheless a genuine *de facto* possibility that a life sentence could be reduced by means of a pardon. In addition, the obligatory periodic review of life sentences – which, the Government conceded, had only entered into force after the application was lodged with the Court –, provided for the release on parole of a life prisoner if the Joint Court of Justice was of the opinion that a continuation of the custodial sentence would no longer serve any reasonable purpose.

97. The Government were further of the view that the conditions of the applicant's detention in no way justified a conclusion that he had been subjected to inhuman or degrading treatment or punishment in breach of Article 3. As regards the applicant's complaints that he had never been placed under a regime befitting his mental condition and that his life sentence was *de facto* irreducible because he had not been offered adequate treatment for his personality disorder or transferred to a custodial institution in the Netherlands, the Government submitted that in 1980, when the applicant was sentenced, it had not been possible to impose a TBS order for confinement in a custodial clinic in the Netherlands Antilles. There had been no custodial clinic in either Curaçao or Aruba and the applicant's transfer to such an institution in the Netherlands had been considered impossible in view of his limited intelligence and insufficient ability to express himself verbally. Mental health treatment thus specifically not being part of the Joint Court of Justice's judgment, no blame could be attached to the national authorities for not executing a measure that had not been imposed. It did not appear from either the applicant's contacts with the prisons' social workers or the numerous letters he had addressed to various authorities that a lack of mental health assistance had been his main concern. In any event, the applicant had been offered psychiatric help for his personality disorder during the time he was incarcerated in Curaçao. In this connection the Government referred to the letter of Dr M. de O., according to which the applicant had, upon his arrival in the prison in Curaçao, been placed under psychiatric observation and good contact of a therapeutic nature had been established with a view to his rehabilitation (see paragraph 34 above). This therapeutic contact had ended when the applicant had been moved to Aruba, a transfer he had specifically requested despite being aware that the prison complex there did not comprise a Forensic Observation and Counselling Unit and that the availability of psychiatric help would be limited. The Government had not been informed of any contacts between the applicant and psychiatrists or psychologists in Aruba until 2011, when the first periodic review of his life sentence was carried out. Psychiatric help had been available to him in Aruba since the adoption of the judgment of the Joint Court of Justice of 21 September 2012.

98. While the Government acknowledged that long-term imprisonment could have a number of desocialising effects on inmates, they submitted that in practice the applicant had been able to engage in a relevant daily programme in the prison in Aruba. He had been a talented upholsterer and had worked eight hours a day in the prison's upholstery department. He had also occasionally attended Bible studies.

C. The Court's assessment

1. Relevant principles

(a) Life sentences

99. It is well established in the Court's case-law that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Kafkaris*, cited above, § 97, and references cited therein), provided that it is not grossly disproportionate (see *Vinter and Others*, cited above, § 102). The Court has, however, held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see *Kafkaris*, cited above, § 97). A life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98, and *Vinter and Others*, cited above, § 108). On the basis of a detailed review of the relevant considerations emerging from its case-law and from recent comparative and international-law trends in respect of life sentences, the Court has found in *Vinter and Others* that a life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the imposition of the sentence (see *Vinter and Others*, cited above, §§ 104-118 and 122). It further observed in that case that the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter (ibid., § 120, see also *Bodein v. France*, no. 40014/10, § 61, 13 November 2014). It is for the States to decide – and not for the Court to prescribe – what form (executive or judicial) that review should take (see *Kafkaris*, cited above, § 99, and *Vinter and Others*, cited above, §§ 104 and 120). The Court has held that presidential clemency may thus be compatible with the requirements flowing from its case-law (see *Kafkaris*, cited above, § 102).

100. The Court has further found that a prisoner cannot be detained unless there are legitimate penological grounds for incarceration, which include punishment, deterrence, public protection and rehabilitation. While many of these grounds will be present at the time when a life sentence is

imposed, the balance between these justifications for detention is not necessarily static and might shift in the course of the execution of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence, that these factors or shifts can be properly evaluated (*Vinter and Others*, cited above, § 111). The review required in order for a life sentence to be reducible should therefore allow the domestic authorities to consider whether, in the course of the sentence, any changes in the life prisoner and progress towards his or her rehabilitation are of such significance that continued detention is no longer justified on legitimate penological grounds (ibid., § 119). This assessment must be based on rules having a sufficient degree of clarity and certainty (ibid., §§ 125 and 129; see also *László Magyar v. Hungary*, no. 73593/10, § 57, 20 May 2014, and *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §§ 255, 257 and 262, ECHR 2014 (extracts)) and the conditions laid down in domestic legislation must reflect the conditions set out in the Court's case-law (see *Vinter and Others*, cited above, § 128). Thus, a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment (see *Vinter and Others*, cited above, § 127, and *Öcalan v. Turkey (no. 2)*, nos. 24069/03, 197/04, 6201/06 and 10464/07, § 203, 18 March 2014). A Chamber of the Court held in a recent case that the assessment must be based on objective, pre-established criteria (see *Trabelsi v. Belgium*, no. 140/10, § 137, ECHR 2014 (extracts)). The prisoner's right to a review entails an actual assessment of the relevant information (see *László Magyar*, cited above, § 57), and the review must also be surrounded by sufficient procedural guarantees (see *Kafkaris*, cited above, § 105, and *Harakchiev and Tolumov*, cited above, § 262). To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided, and this should be safeguarded by access to judicial review (see *László Magyar*, cited above, § 57, and *Harakchiev and Tolumov*, cited above, §§ 258 and 262). Finally, in assessing whether the life sentence is reducible *de facto* it may be of relevance to take account of statistical information on prior use of the review mechanism in question, including the number of persons having been granted a pardon (see *Kafkaris*, cited above, § 103; *Harakchiev and Tolumov*, cited above, §§ 252 and 262; and *Bodein*, cited above, § 59).

(b) Rehabilitation and the prospect of release for life prisoners

101. As set out in the preceding paragraph, the review required in order for a life sentence to be reducible should permit the authorities to assess any changes in the life prisoner and any progress towards rehabilitation made by him or her. In *Vinter and Others* (cited above) the Grand Chamber thus

addressed the problem of how to determine whether, in a given case, a life sentence could be regarded as reducible specifically in the light of the rehabilitation function of incarceration. In this context, it held that it would be incompatible with human dignity – which lay at the very essence of the Convention system – forcefully to deprive a person of his freedom without striving towards his rehabilitation and providing him with the chance to regain that freedom at some future date (ibid., § 113). It went on to note that there was now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved (ibid., § 114). While punishment remained one of the aims of imprisonment, the emphasis in European penal policy was now on the rehabilitative aim of imprisonment, even in the case of life prisoners; this was expressed in Rules 6, 102.1 and 103.8 of the European Prison Rules, Resolution (76) 2 and Recommendations Rec(2003)23 and Rec(2003)22 of the Committee of Ministers, statements by the Committee for the Prevention of Torture, and the practice of a number of Contracting States. The same commitment to rehabilitation was to be found in international law, as expressed, *inter alia*, in Article 10 § 3 of the International Covenant on Civil and Political Rights and the General Comment on that Article (ibid., §§ 115-118).

102. The Court observes that the principle of rehabilitation, that is, the reintegration into society of a convicted person, is reflected in international norms (see paragraphs 70-76 above) and has not only been recognised but has over time also gained increasing importance in the Court's case-law under various provisions of the Convention (see, apart from *Vinter and Others*, cited above, for instance *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 28, ECHR 2007-V; *James, Wells and Lee v. the United Kingdom*, nos. 25119/09, 57715/09 and 57877/09, § 209, 18 September 2012; and *Khoroshenko v. Russia* [GC], no. 41418/04, §§ 121 and 144-145, ECHR 2015). In a slightly different context the Court has, moreover, held that, in circumstances where a Government seek to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders (*James, Wells and Lee*, cited above, § 218). One of the aims of rehabilitation is to prevent reoffending and thus to ensure the protection of society.

103. Notwithstanding the fact that the Convention does not guarantee, as such, a right to rehabilitation, the Court's case-law thus presupposes that convicted persons, including life prisoners, should be allowed to rehabilitate themselves. Indeed, the Court has held that " ... a whole-life prisoner is entitled to know ... what he or she must do to be considered for release and under what conditions" (*Vinter and Others*, cited above, § 122). It has also

held, with reference to *Vinter and Others*, that national authorities must give life prisoners a real opportunity to rehabilitate themselves (see *Harakchiev and Tolumov*, cited above, § 264). It follows from this that a life prisoner must be realistically enabled, to the extent possible within the constraints of the prison context, to make such progress towards rehabilitation that it offers him or her the hope of one day being eligible for parole or conditional release. This could be achieved, for example, by setting up and periodically reviewing an individualised programme that will encourage the sentenced prisoner to develop himself or herself to be able to lead a responsible and crime-free life.

104. Life prisoners are thus to be provided with an opportunity to rehabilitate themselves. As to the extent of any obligations incumbent on States in this regard, the Court considers that even though States are not responsible for achieving the rehabilitation of life prisoners (see *Harakchiev and Tolumov*, cited above, § 264), they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. Were it otherwise, a life prisoner could in effect be denied the possibility of rehabilitation, with the consequence that the review required for a life sentence to be reducible, in which a life prisoner's progress towards rehabilitation is to be assessed, might never be genuinely capable of leading to the commutation, remission or termination of the life sentence or to the conditional release of the prisoner. In this connection the Court reiterates the principle – well established in its case-law – that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, among many other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 123, ECHR 2010). The obligation to offer a possibility of rehabilitation is to be seen as an obligation of means, not one of result. However, it entails a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation. In this context the Court has previously held that such an obligation exists in situations where it is the prison regime or the conditions of detention which obstruct rehabilitation (see *Harakchiev and Tolumov*, cited above, § 266).

(c) Health care provided to prisoners with mental health problems

105. As regards the treatment of prisoners with mental health problems, the Court has consistently held that Article 3 of the Convention requires States to ensure that the health and well-being of prisoners are adequately secured by, among other things, providing them with the requisite medical assistance (see, among many other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; *Sławomir Musiał v. Poland*, no. 28300/06, § 87, 20 January 2009; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 128, ECHR 2009). A lack of appropriate medical care for persons in custody is therefore capable of engaging a

State's responsibility under Article 3 (see *Naumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004). Obligations under Article 3 may go so far as to impose an obligation on the State to transfer prisoners (including mentally ill ones) to special facilities in order to receive adequate treatment (see *Raffray Taddei v. France*, no. 36435/07, § 63, 21 December 2010).

106. In the case of mentally ill prisoners, the Court has held that the assessment of whether particular conditions of detention are incompatible with the standards of Article 3 has to take into consideration the vulnerability of those persons and, in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment (see, for example, *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244, and *Aerts v. Belgium*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V). In addition, it is not enough for such detainees to be examined and a diagnosis made; instead, it is essential that proper treatment for the problem diagnosed and suitable medical supervision should also be provided (see *Raffray Taddei*, cited above, § 59).

(d) Life prisoners with mental disabilities and/or mental health problems

107. Life prisoners who have been held to be criminally responsible for the offences of which they have been found guilty – and who are therefore not considered "persons of unsound mind" within the meaning of Article 5 § 1 (e) of the Convention – may nevertheless have certain mental health problems; they may for instance have behavioural or social problems or suffer from various kinds of personality disorders, all of which may impact on the risk of their reoffending. The Court has not previously dealt with the specific issue of the reducibility of life sentences imposed on persons who have been diagnosed as suffering from a mental disability and/or a mental health condition. Against the background of the case-law set out above (paragraphs 99-106), the Court finds the following approach to be appropriate in this regard.

108. For a State to comply with its obligations under Article 3 of the Convention in respect of life prisoners belonging to this category, the Court considers that it is firstly required that an assessment be made of those prisoners' needs as regards treatment with a view to facilitating their rehabilitation and reducing the risk of their reoffending. This assessment should also address the likely chances of success of any identified forms of treatment, given that Article 3 cannot entail an obligation for a State to enable a life prisoner to receive treatment that is not realistically expected to have any significant impact in helping the life prisoner to rehabilitate himself or herself. For this reason, account is to be taken of the life prisoner's individual situation and personality. The Court, moreover, recognises that certain mental health conditions are not, or not easily, amenable to treatment. Given that, owing to their mental health situation,

such life prisoners may not themselves be sufficiently aware of a need for treatment, the aforementioned assessment should be conducted regardless of whether any request for treatment has been expressed by them (see paragraph 106 above). Where the assessment leads to the conclusion that a particular treatment or therapy may indeed help the life prisoner to rehabilitate himself or herself, he or she is to be enabled to receive that treatment to the extent possible within the constraints of the prison context (see the relevant Council of Europe instruments set out in paragraphs 66-69 above; see also paragraph 103 above). This is of particular importance where treatment in effect constitutes a precondition for the life prisoner's possible, future eligibility for release and is thus a crucial aspect of *de facto* reducibility of the life sentence.

109. Providing life prisoners with a real opportunity of rehabilitation may therefore require that, depending on their individual situation, they be enabled to undergo treatments or therapies – be they medical, psychological or psychiatric – adapted to their situation with a view to facilitating their rehabilitation. This entails that they should also be allowed to take part in occupational or other activities where these may be considered to benefit rehabilitation.

110. In general it will be for the State to decide, and not for the Court to prescribe, which facilities, measures or treatments are required in order to enable a life prisoner to rehabilitate himself or herself in such a way as to become eligible for release. In choosing the means for that purpose, States accordingly have a wide margin of appreciation and this obligation under Article 3 is to be interpreted in such a way as not to impose an excessive burden on national authorities.

111. Consequently, a State will have complied with its obligations under Article 3 when it has provided for conditions of detention and facilities, measures or treatments capable of enabling a life prisoner to rehabilitate himself or herself, even when that prisoner has not succeeded in making sufficient progress to allow the conclusion that the danger he or she poses to society has been alleviated to such an extent that he or she has become eligible for release. In this connection the Court reiterates that States also have a duty under the Convention to take measures to protect the public from violent crime and that the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public (see *Vinter and Others*, cited above, § 108, with further references). States may fulfil that positive obligation to protect the public by continuing to detain life prisoners for as long as they remain dangerous (see, for instance, *Maiorano and Others v. Italy*, no. 28634/06, §§ 115-122, 15 December 2009).

112. In conclusion, life prisoners should thus be detained under such conditions, and be provided with such treatment, that they are given a

realistic opportunity to rehabilitate themselves in order to have a hope of release. A failure to provide a life prisoner with such opportunity may accordingly render the life sentence *de facto* irreducible.

2. Application of the above relevant principles to the present case

113. The Court will now turn to the question whether the life sentence imposed on the applicant was reducible. It reiterates that in order for a life sentence to be reducible and thus compatible with Article 3 of the Convention, there must be both a prospect of release and a possibility of review (see *Vinter and Others*, cited above, §§ 109-110).

114. As set out above (see paragraph 92), the Chamber examined the question whether the applicant's life sentence was compatible with Article 3 separately from the applicant's other complaints under that provision concerning the conditions of his detention. However, the Grand Chamber finds on the basis of the Court's case-law and the relevant principles set out in paragraphs 107-112 above, that the different aspects of these complaints under Article 3 are closely interrelated in the present case. Indeed, these aspects were also brought together by the applicant already in his letter of 2 November 2012 (see paragraph 91 above) and he based his main submissions to the Grand Chamber on the contention that he had no prospect of release as he was not provided with any treatment for his mental disorder which might have reduced the risk of recidivism that he was considered to pose. This being so, the Court finds it appropriate to assess the different aspects of the Article 3 complaints jointly.

115. Accordingly, in its examination of the question whether the life sentence imposed on the applicant was reducible, the Court will consider whether the alleged lack of psychiatric or psychological treatment in effect deprived the applicant of any prospect of release.

116. In its assessment the Court will focus on the applicant's situation from the time he lodged his application in 2010. It cannot, however, lose sight of the fact that at that time he had already been imprisoned for about thirty years. In this context the Court observes that the rejections of the applicant's various requests for pardon were *inter alia* based on the assessment that the risk of recidivism which he was considered to pose continued to exist. In the later years of his incarceration this in fact became the sole reason for the refusal to grant him release of any kind. While the risk of reoffending and the need to protect society are relevant penological grounds capable of justifying continued detention of a life prisoner (see paragraph 100 above), the Court will nevertheless have to assess whether the applicant in the specific circumstances of the present case was offered possibilities of rehabilitating himself also during the period of his imprisonment preceding the lodging by him of the present application, as the existence of such possibilities, in particular of any that addressed his mental health problems, may have affected his prospects of release.

117. The Court observes in this connection that in the context of the criminal proceedings against him on charges of murder, the applicant was examined in 1979 by a psychiatrist, who diagnosed him as a retarded, infantile and narcissistic young man whose character structure had a serious disturbance of a psychopathiform nature and recommended that he receive institutional treatment for a lengthy period or that attempts be made in the prison setting to attain a stronger personality structure in order to avoid recidivism (see paragraph 33 above). Owing to the fact that no order for placement in a custodial clinic could be imposed in the Netherlands Antilles at that time – as the applicable law did not provide for such a measure – and considering that placement in such a clinic in the European part of the Kingdom was not feasible, the Joint Court of Justice imposed a sentence of life imprisonment on the applicant on 11 March 1980 (see paragraphs 15-16 above). However, the Court considers that the applicant's detention in a prison rather than in a custodial clinic could not have obviated the need for the recommended treatment. Nor can the Court accept that by dint of the mere fact that the punishment imposed on the applicant did not comprise a measure stipulating that he undergo treatment, the Government were under no further obligation in this regard for the duration of the applicant's incarceration. It reiterates that States are under an obligation to provide detainees suffering from health problems – including mental health problems – with appropriate medical care (see paragraph 105 above), *inter alia* with a view to allowing them, if possible, to rehabilitate themselves, regardless of whether a detainee has made a request to that effect (see paragraphs 106 and 108 above).

118. The applicant's contention that he was never provided with any treatment for his mental condition during the time he was imprisoned finds some support in CPT reports on visits by that body to the prisons in Curaçao and Aruba where the applicant was, or had been, detained, and according to which mental health care in those two institutions was insufficient (see paragraph 57 above). It is furthermore clearly supported by the case file, *inter alia* by the email from the senior social worker in the prison in Aruba of 29 July 2014 (see paragraph 46 above) and by a report of 1 September 2014 drawn up by the psychologist at the same prison, both of which state that there is no mention in the applicant's medical file of his having undergone any psychiatric or psychological treatment (see paragraph 45 above).

119. Indeed, the Government did not dispute that the applicant had not received treatment as such but they stressed that he had been provided with some form of psychiatric help when he was detained in Curaçao, which he chose to forego when he requested and obtained a transfer to Aruba where, certainly during the first years of his incarceration there, very limited possibilities of such help existed. However, even if it is accepted that some basic mental health care was available to the applicant, it remains to be

examined whether this was sufficient to comply with the respondent Government's obligation to provide the applicant with the possibility of rehabilitating himself.

120. In this context the Court would firstly observe that the principle of the rehabilitation of prisoners has, at least from 1999 onwards, been explicitly recognised in the applicable national law, in which it is stipulated that a custodial sentence should also serve to prepare detainees for their return to society (see paragraph 48 above). The Court further notes that certain measures were taken and facilities offered which, even if their main purpose was not the applicant's rehabilitation, may be considered conducive to that purpose. Thus, the applicant was transferred from Curaçao to Aruba in 1999. The applicant had requested this transfer in order to be closer to members of his family, and it was considered to be beneficial for his rehabilitation and psychologically favourable for him (see paragraphs 34-35 above). The applicant was able to work and benefited from the structured life in prison (see paragraph 42 above). He was reported to have changed over the years: while he may be described as having been a troublesome inmate in the early years of his incarceration in Curaçao, he significantly improved his behaviour during his detention in Aruba (see paragraphs 19, 40 and 42 above).

121. Nevertheless, throughout his imprisonment the risk of the applicant's reoffending was deemed too great for him to be considered eligible for a pardon or, after the periodic review of his life sentence, for conditional release. In this connection the Court notes that one of the judges of the Joint Court of Justice wrote in 1997, when consulted about a request for a pardon lodged by the applicant, that he considered it would be irresponsible to grant a pardon to the applicant, whose risk of reoffending had been established to be high and who had not received the treatment in prison that had been recommended (see paragraph 24 above). The Joint Court of Justice also noted in its advice to the Governor of Curaçao, relating to that same request for a pardon, that the applicant had not undergone any (psychiatric) treatment aimed at strengthening his personality structure in order to prevent recidivism (see paragraph 24 above). Finally, and most markedly, the Joint Court of Justice observed in its decision of 21 September 2012 pursuant to the periodic review of the applicant's life sentence that important aspects of the applicant's disturbed personality, on the basis of which it had originally been concluded that the risk of recidivism was high, were still present and that no treatment had taken place during the years of detention. Although the Joint Court of Justice found that after 33 years the applicant's imprisonment no longer served the aim of retribution, it concluded that his continued detention was necessary in order to protect the public as the risk of his reoffending remained too great to allow his release (see paragraphs 8.4, 8.6. 8.7 and 8.12 of the Joint Court's decision set out in paragraph 32 above).

122. It transpires clearly from the decisions of the Joint Court of Justice mentioned in the preceding paragraph that there was a close link in the present case between the persistence of the risk of the applicant's reoffending on the one hand and the lack of treatment on the other. Moreover, the Court observes that the authorities were aware that treatment had been recommended in order to prevent recidivism and that they were also aware that the applicant had not received any.

123. The applicant therefore found himself in a situation where he was not deemed eligible for parole or release owing to the risk of reoffending, whereas the persistence of that risk was linked to the fact that no assessment of treatment needs and possibilities had been conducted and no identified forms of treatment with a view to rehabilitation had been provided. Consequently, treatment constituted, in practice, a precondition for the applicant to have the possibility of progressing towards rehabilitation, reducing the risk of his reoffending. An issue of the *de facto* reducibility of his life sentence was, accordingly, at stake.

124. As already stated above (paragraph 110), States have a wide margin of appreciation in the determination of what facilities or measures are required in order to give a life prisoner the possibility of rehabilitating himself or herself to such an extent that he or she may one day become eligible for release. It is accordingly not for the Court to prescribe what treatment was required in the specific circumstances. However, although the applicant in the present case was indeed initially, prior to being sentenced to life imprisonment, assessed as requiring treatment, it does not appear that any further assessments were carried out – either when he started serving his sentence or thereafter – of the kind of treatment that might be required and could be made available or of the applicant's aptitude and willingness to receive such treatment. In the Court's view, very little, if any, relevance falls to be attached to the fact that the applicant himself had not apparently been concerned about procuring treatment and had preferred to be transferred from Curaçao to Aruba where the availability of psychiatric help was (even more) limited. It must be borne in mind that persons with mental health problems may have difficulties in assessing their own situation or needs, and may be unable to indicate coherently, or even at all, that they require treatment (see also paragraph 106 above).

125. Having regard to the foregoing, the Court finds that the lack of any kind of treatment or even of any assessment of treatment needs and possibilities meant that, at the time the applicant lodged his application with the Court, any request by him for a pardon was in practice incapable of leading to the conclusion that he had made such significant progress towards rehabilitation that his continued detention would no longer serve any penological purpose. This finding likewise applies to the first, and in fact only, periodic review that was carried out of the applicant's life

sentence. This leads the Court to the conclusion that the applicant's life sentence was not *de facto* reducible as required by Article 3.

126. This being the case, the Court does not consider it necessary to conduct any further or more detailed analysis of either the pardons system or the periodic review mechanism with a view to assessing whether the life sentence was *de jure* reducible, or of the regime under which the applicant was detained.

127. Accordingly, there has been a violation of Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

128. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

129. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage which he had suffered as a result of ill-treatment, the lack of (mental health) treatment and the long period of unacceptable, inhuman and degrading conditions of detention.

130. The Government considered this amount unreasonable.

131. The Court considers in the circumstances of the present case that its finding of a violation of Article 3 constitutes sufficient just satisfaction and accordingly makes no award as regards any non-pecuniary damage that may have been sustained by the applicant.

B. Costs and expenses

132. The applicant claimed EUR 40,200 in respect of 134 hours of work performed by his counsel in connection with the periodic review conducted in Curaçao and with the Strasbourg proceedings, EUR 464.33 in respect of air fares and other travel expenses incurred by his counsel in and between Curaçao and Aruba, and EUR 188.10 for hotel expenses incurred for the attendance at the hearing in Strasbourg of counsel and her adviser. The total amount claimed under this head thus came to EUR 40,852.43.

133. The Government were of the view that both the hourly fee of EUR 300 and the number of hours billed were excessive.

134. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as

to quantum. Furthermore, they are only recoverable to the extent that they relate to the violation found (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 418, ECHR 2011, and *Creangă v. Romania* [GC], no. 29226/03, § 130, 23 February 2012). In this connection the Court reiterates that the applicant's claims were only partially successful before it. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to make an award of EUR 27,500 for the proceedings before the Court.

C. Default interest

135. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objections concerning the standing of the applicant's son Johnny Francis van Heyningen and his sister Altagracia Murray to pursue the application and the applicant's victim status for the purposes of Article 34 of the Convention;

2. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;

3. *Holds*, by twelve votes to five, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicant;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay to the aforementioned Mr van Heyningen and Ms Murray, jointly, within three months, EUR 27,500 (twenty-seven thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to them;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 April 2016.

Johan Callewaert	Guido Raimondi
Deputy to the Registrar	President

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

(a) concurring opinion of Judge Silvis;

(b) partly concurring opinion of Judge Pinto de Albuquerque;

(c) joint partly dissenting opinion of Judges Spielmann, Sajó, Karakaş and Pinto de Albuquerque.

G.R.A.
J.C.

CONCURRING OPINION OF JUDGE SILVIS

I agree with this judgment, which signifies an important change in the Court's determination of the reducibility of life sentences. The innovation concerns the *de facto* aspect of reducibility. In the Chamber judgment the Court's now revised standard interpretation of *de facto* reducibility was applied and it was on that basis, combined with the refusal of the Chamber to lend generous retroactive effect to the *Vinter* case-law on the reducibility of life sentences, that no violation was found. Whether a life sentence was *de jure* and *de facto* reducible used to depend upon characteristics of decision-making and examples tending to suggest that a person serving a whole-life sentence would be able to obtain an adjustment of that sentence, having regard to the circumstances (see *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 262, ECHR 2014 (extracts)). In the current judgment the Court has put the emphasis on the obligation of the State not to leave a life-sentenced person with a personality disorder without serious rehabilitative support to be able to qualify (*de facto*) for possible release. Thus *de facto* reducibility is taken to be more than just a general characteristic of the system for releasing life-sentenced persons. Originally I joined the unanimous conclusion of the Chamber that there had been no violation of Article 3 concerning the reducibility of the life sentence, but I have to admit that the applicant's representative has convincingly shown to the Grand Chamber that the possibility of release had no substantive meaning in the circumstances of this case, where the applicant could not reasonably have qualified for it by means of his own efforts.

PARTLY CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. With the exception of the unfortunate decision on Article 41, I wholeheartedly subscribe to the judgment of the Grand Chamber, which should be hailed as a major step forward in the protection of the human rights of prisoners. But precisely in view of the importance of the case for the clarification of the State's positive obligations in the field of prison law, I find it necessary to add some thoughts on the two core issues dealt with by the Grand Chamber: the obligation to promote resocialisation of prisoners through individualised sentence plans and the obligation to provide for a judicial, fair and objective mechanism of review of the penological needs for continued incarceration[1]. These two issues being closely intertwined, the Grand Chamber quite rightly addresses both in the part of the judgment dedicated to the "relevant principles". The purposes of this opinion are to underscore the explicit consequences and to point out the implicit consequences of the Grand Chamber's finding of a violation of Article 3 of European Convention on Human Rights (the "Convention").

The State's obligation to provide an individualised sentence plan

2. Perfectly in line with the reasoning of *Vinter and Others*[2], the Grand Chamber finds in the present case that the Contracting Parties to the Convention have a positive obligation to promote resocialisation of

1. For the purpose of terminological clarity, it must be stated that resocialisation is the correct word in penal and prison law to designate the primary purpose of imprisonment; it refers to the social reintegration of the prisoner who is capable of leading a crime-free life after release. Rehabilitation has a moralistic and paternalistic connotation, deriving from the wrong assumption that the State is responsible for the prisoner's "moral reform" and his or her "conversion" to the majority's social values. As I argued in my separate opinion appended to *Öcalan v. Turkey (no. 2)* (nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014), this assumption is outdated, because resocialisation is no longer understood, as in the classical medical analogy, as a "treatment" or "cure" of the prisoner, aimed at the reformation of the prisoner's character, but as a less ambitious, yet more realistic task: his or her preparation for a law-abiding life after prison. There are three reasons for this: firstly, it is problematic to propose that States have the constitutional power to "reform" the character of an adult; secondly, it is doubtful that such reform is feasible; thirdly, it is even more uncertain that such reform can be established. In other words, the rehabilitative ideology is confronted with problems of constitutional legitimacy, practical feasibility and evidential establishment. The Court has referred to the term resocialisation in paragraph 70 of the present judgment and on occasion in previous cases (see, for example, *Stummer v. Austria* [GC], no. 37452/02, §§ 93-94, ECHR 2011), but it unfortunately does not adhere to a uniform legal language. Resocialisation is also used in Rule 223 of the Rules of Procedure and Evidence of the International Criminal Court.

2. *Vinter and Others v. the United Kingdom* [GC], nos. 66060/09, 130/190 and 3896/10, ECHR 2013 (extracts).

prisoners (paragraph 109 of the judgment), namely by providing and implementing an individualised sentence plan (paragraph 103). This is the very first time that the Court has acknowledged the crucial importance of an individualised sentence plan for the promotion of resocialisation of prisoners, that importance being reinforced by a statement of principle of the Grand Chamber. The obligation to promote resocialisation is an Article 3 obligation which imposes on the State a duty to act or, to use the words of the Grand Chamber, "a duty to make it possible for such prisoners to rehabilitate themselves" (paragraph 104)[3]. Thus, the Grand Chamber perceives the State's legal obligations to promote resocialisation and to provide and implement an individualised sentence plan as two sides of the same coin.

3. The obligation to promote resocialisation is obviously an obligation of means: the State is only obliged to provide the means for the prisoner to make the effort to reintegrate himself or herself into society. This is the meaning of the self-evident last sentence of paragraph 104. But the Article 3 obligation to provide the "conditions of detention and facilities, measures and treatments", in other words, the appropriate individualised sentence plan and the respective implementation conditions, is an obligation of result, as is crystal clear from the language of paragraph 111. The statement of the Grand Chamber in this paragraph is quite assertive: the State will have complied with its obligations under Article 3 "when it has provided" for conditions of detention, facilities, measures and treatments capable of enabling a life prisoner to reintegrate himself or herself into society, and this obligation is independent from the prisoner's willingness to make use of those facilities, measures and treatments. It is in this light that the reference to an "individualised programme" in paragraph 103 as an "example" of a resocialisation-oriented prison policy must be interpreted. In other words, the meaning of the exemplificative language of paragraph 103 is only understandable in the context of the strongly assertive language of paragraph 111. The individualised sentence plan is the central pillar of a resocialisation-oriented prison policy, but it should be articulated with a set of other detention conditions, material facilities, practical measures and psychiatric, psychological and other medical treatment.

4. From the Grand Chamber's perspective, the scope of the State's obligation to promote resocialisation and to provide and implement an individualised sentence plan is the widest possible. Although Mr Murray was diagnosed with a pathological disorder, in particular a very limited

3. It is relevant to underscore the insistence with which the Court uses the word "obligation" in the "relevant principles" part of the judgment (seven times in paragraph 104, once in paragraph 105, once in paragraph 108, once in paragraph 110 and twice in paragraph 111). This language, with its clear legal meaning, demonstrates, without a shadow of doubt, the Grand Chamber's determination to impose mandatory principles on States.

development of his mental faculties, he was never considered mentally insane. Neither the few psychiatrists consulted nor the domestic courts questioned his criminal liability. Yet the Court does not restrict the scope of its analysis to a discussion of the State's obligation to provide resocialisation programmes to mentally sane offenders. On the contrary, the broad language used in paragraph 109, which refers to "treatments or therapies – be they medical, psychological or psychiatric", clearly indicates the willingness of the Grand Chamber to submit the State to the same obligation *vis-à-vis* mentally insane offenders. In view of the borderline nature of Mr Murray's mental condition, the Grand Chamber purposely expands its analysis to the situation of all "prisoners with mental health problems" (sub-heading (c) of "the relevant principles" of "[t]he Court's assessment"), regardless of the gravity of the mental illnesses or disorders of the prisoner, the degree of the prisoner's impairment in taking autonomous decisions and the determination of the relevant legal status as a mentally sane or insane offender in the criminal proceedings. Such an unrestricted approach is obviously comprehensible in the light of both Recommendation No. R (98)7 of the Committee of Ministers of the Council of Europe to the member States concerning the ethical and organisational aspects of health care in prison and the 2006 European Prison Rules, which the Court cites abundantly in paragraphs 66 and 73-76 of the judgment.

5. Accordingly, as a matter of law, there is an international positive obligation for States Parties to the Convention to provide and implement an individualised sentence plan, with a comprehensive and updated risk and needs assessment, at least, for all mentally sane offenders sentenced to life or long-term imprisonment, that is, a prison sentence or sentences totalling five years or more[4]. Mentally insane offenders subjected to a similar period of internment or longer should, *a fortiori*, benefit from the same plan. In spite of the apparent focus on the situation of life prisoners, the Grand Chamber does signal that its principled approach to the obligation to promote resocialisation applies to "all prisoners, including those serving life

4. As I argued in my separate opinion in *Tautkus v. Lithuania* (no. 29474/09, 27 November 2012), and later on, in the company of Judge Turković, in *Khoroshenko v. Russia* ([GC], no. 41418/04, ECHR 2015), the right to an individualised sentence plan applies to mentally sane offenders, especially those sentenced to life or long-term imprisonment, that is, a prison sentence or sentences totalling five years or more. The commentary to Rule 103 of the 2006 European Prison Rules states: "[The Rule] emphasizes the need to take action without delay in order to involve prisoners in the planning of their careers in prison, in a way that makes the best use of the programmes and facilities that are on offer. Sentence planning is a vital part of this but it is recognised that such plans need not be drawn up for prisoners serving a very short term." The time-limit of five years stems from the Council of Europe's definition of long-term imprisonment. The French version of the commentary allows for sentence planning even in the case of short-term imprisonment, thus contradicting the English version. In *Murray* the scope of the "relevant principles" as regards sentence planning is not restricted to long terms and includes shorter terms of imprisonment.

sentences"[5]. When referring specifically to the individualised programme, the Grand Chamber also mentions in general terms the "sentenced prisoner", not the life prisoner, as the beneficiary of such programme.

6. Indeed, both the Council of Europe and the United Nations have for many years and on numerous occasions defended the imperative necessity of an individual sentence plan based on a permanently updated risk and psychiatric and social needs assessment of the inmate concerned, regardless of whether their mental condition be normal or abnormal [6].

In its Resolution (73) 5 on Standard Minimum Rules for the Treatment of Prisoners, the Committee of Ministers stated as follows:

> "7. When prisoners are being allocated to different institutions, due account shall be taken of their mental condition (normal or abnormal), and, in the case of convicted prisoners, the special requirements of their treatment. ...
>
> 67.4. Individual treatment programmes shall be drawn up after consultation between the various categories of personnel. Prisoners shall be involved in the drawing up of their individual treatment programmes. The programmes should be periodically reviewed." (my emphasis)

Resolution (76) 2 on the Treatment of Long-Term Prisoners provided that national authorities should "grant periods of leave from prison not as a relief from detention but as an integral part of the programme of treatment".

Recommendation No. R (87) 3 of the Committee of Ministers to member States on the European Prison Rules provided as follows:

> "11.1. In allocating prisoners to different institutions or regimes, due account shall be taken of the special requirements of their treatment, of their medical needs, their sex and age. ...
>
> 67.1. Since the fulfilment of these objectives requires individualisation of treatment and, for this purpose, a flexible system of allocation, prisoners should be placed in separate institutions or units where each can receive the appropriate treatment and training. ...
>
> 68. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of a suitable length, a programme of treatment in a suitable institution shall be prepared in the light of the knowledge obtained about individual needs, capacities and dispositions, especially proximity to relatives." (my emphasis)

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5. See paragraph 101, followed by paragraph 102 ("a convicted person") and paragraph 103 ("convicted persons, including life prisoners").

6. Following its good practice, the Grand Chamber offers in the present judgment an interpretation of the Convention in line with the relevant Council of Europe soft law. The Convention must be interpreted taking into account not only other human rights treaties, but also hard and soft law instruments related to it and especially the system of human rights protection of the Council of Europe within which it fits, as Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties provides (for a recent, laudable example, see *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 204, ECHR 2014 (extracts)). Nevertheless, some very important passages of the relevant international texts, to which I will make reference, have been omitted.

Recommendation Rec(2003)23 of the Committee of Ministers to member States on the management by prison administrations of life-sentence and other long-term prisoners stated, *inter alia*, as follows:

> "3. Consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence (individualisation principle). ...
>
> 8. Individual planning for the management of the prisoner's life or long-term sentence should aim at securing progressive movement through the prison system (progression principle).
>
> 9. In order to achieve the general objectives and comply with the principles mentioned above, comprehensive sentence plans should be developed for each individual prisoner.
>
> 10. Sentence plans should include a risk and needs assessment of each prisoner and be used to provide a systematic approach to:
>
> – the initial allocation of the prisoner;
>
> – progressive movement through the prison system from more to less restrictive conditions with, ideally, a final phase spent under open conditions, preferably in the community; ...
>
> 11. Sentence planning should start as early as possible following entry into prison, be reviewed at regular intervals and modified as necessary." (my emphasis)

Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules confirm and reinforce what the 1987 Prison Rules had already stated.

> "103.2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release. ...
>
> 104.2. There shall be procedures for establishing and regularly reviewing individual sentence plans for prisoners after the consideration of appropriate reports, full consultations among the relevant staff and with the prisoners concerned who shall be involved as far as is practicable." (my emphasis)

The CPT Standards (CPT/Inf/E (2002) 1 - Rev. 2011) on long-term imprisonment and long-term prisoners describe a range of psychological problems which they face. In the view of the CPT, the regimes which are offered to prisoners serving long sentences should seek to compensate for these effects in a positive and proactive way:

> "33. Additional steps should be taken to lend meaning to their period of imprisonment; in particular, the provision of individualised custody plans and appropriate psycho-social support are important elements in assisting such prisoners to come to terms with their period of incarceration and, when the time comes, to prepare for release. ...
>
> 37. Psychiatric treatment should be based on an individualised approach, which implies the drawing up of a treatment plan for each patient." (my emphasis)

The European penological standards correspond to and are based on the universal regime approved long ago by the United Nations. The United Nations Standard Minimum Rules for the Treatment of Prisoners, of 1955, provide, *inter alia*, as follows:

> "8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of ... the necessities of their treatment. ...
>
> 63. (1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; ...
>
> 69. As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him in the light of the knowledge obtained about his individual needs, his capacities and dispositions." (my emphasis)

7. The Grand Chamber finds that the positive obligation to promote resocialisation of prisoners and provide and implement an individualised sentence programme was not affected by the deficient material conditions and inadequate resources prevailing in the Netherlands Antilles, as shown in paragraph 117. This lack of resources could not and should not have obviated the need for the recommended treatment. In *James, Wells and Lee*, the Court had already affirmed that "in cases concerning indeterminate sentences of imprisonment a real opportunity for rehabilitation is a necessary element of any part of the detention", insisting that "the inadequate resources at issue in the present case appeared to be the consequence of the introduction of draconian measures for indeterminate detention without the necessary planning and without realistic consideration of the impact of the measures."[7] Member States have to provide for the necessary financial means to pursue their penal policies in accordance with the European human rights standards. Consequently, the more retributive the penal policy, the greater the need to invest sufficiently in the prison system to counteract the well-established negative effects of such policy on those women and men who are subjected to it[8]. That did not occur with

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7. *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 57715/09 57877/09, § 200, 18 September 2012. The Court recognised that denying prisoners access to resocialisation programmes resulted in their not having a realistic chance of making objective progress towards a real reduction in or elimination of the risk they posed, thereby rendering the detention arbitrary. This means that the State is required to provide the prisoners with reasonable opportunities to undertake courses aimed at helping to address their offending behaviour and the risk they pose. If a person is in preventive detention due to the risk that he or she may reoffend, while at the same time deprived of the necessary means, such as suitable therapy, to demonstrate that he or she is no longer dangerous, there will be a violation of Article 5 of the Convention (see *Ostermünchner v. Germany*, no. 36035/04, §§ 73-74, 22 March 2012).

8. See paragraph 42 of the Government's submissions of 1 September 2014: The Government acknowledges that "long-term imprisonment can have a number of desocialising effects on inmates" and that "the CPT has advised the Aruban authorities to draw up a policy for such prisoners" sentenced to life imprisonment.

indeterminate sentences of imprisonment in the United Kingdom, as concluded by the Court in *James, Wells and Lee*. The same criticism is made in *Murray* with regard to the draconian prison policy of the Netherlands Antilles.

8. The criticism of the Grand Chamber finds clear support in the first report of the Committee for the Prevention of Torture (CPT) on the situation in Koraal Specht prison, where the applicant served nineteen years of his sentence, from 1980 to 1999. The CPT report refers to a visit in 1994, when the prison had a total capacity of 198, but at the time of the visit was holding nearly 500 inmates. The CPT did not soften the wording of its judgment:

> "... it must be stated at the outset that the establishment displayed a pernicious combination of overcrowding, a regime which offered very few activities and a poor level of cleanliness and hygiene. These three problems were compounded by the generally run-down state of the establishment. **To subject prisoners to such conditions of detention, amounts, in the CPT's opinion, to inhuman and degrading treatment**." (original emphasis)

On the particular situation of life prisoners, the CPT was even clearer:

> "Having regard, *inter alia*, to the length and indeterminate nature of their sentences, the conditions of detention of the prisoners in the life-sentences unit, particularly those who did not work, **could be considered to be inhuman**; they involved an appreciable risk of deterioration of the mental state of those prisoners and effects of a psychosomatic nature."[9] (original emphasis)

Three years later, the situation had not changed. In its 1997 visit to the same prison, the CPT found the same material conditions ("the overall state of repair of the detention areas and cell equipment had not improved"), but noted that "the conditions of detention of prisoners serving life sentences had indeed changed as compared to those observed in 1994 ... In particular, they were no longer permanently confined to their unit, and their situation was equivalent to that of other prisoners."[10]

In its 1999 visit to the same prison, the CPT observed "some improvement at Koraal Specht Prison as regards certain aspects of the material conditions of detention, attributable in great measure to the decrease in the total number of persons held in the establishment", but added that the prison "still suffer[ed] from a number of serious shortcomings which pose[d] a threat to the basic rights of prisoners (including the right to life and to physical integrity) and put at risk the

9. Report to the authorities of the Kingdom of the Netherlands on the visit to the Netherlands Antilles carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 to 30 June 1994, CPT/Inf (96) 1.

10. Report to the Government of the Netherlands on the visit to the Netherlands Antilles carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 11 December 1997, CPT/Inf (98) 17.

stability of the institution to the detriment of both prisoners and staff." It insisted on "a more developed regime of activities for all prisoners, placing special emphasis on those serving longer sentences" and stated that "[p]risoners should be offered a variety of constructive activities involving a significant part of the day."[11]

On 1 December 1999 the applicant was transferred to the *Korrektie Instituut Aruba* (KIA) or *Instituto Coreccional Nacional* (ICN) in Aruba. The Grand Chamber refers, in paragraph 57 of the judgment, to the CPT visit in 2007 to this prison[12]. This part of the relevant report, although not cited by the Grand Chamber, is important:

> "Long-term imprisonment can have a number of desocialising effects upon inmates. In addition to becoming institutionalised, long-term prisoners may experience a range of psychological problems (including loss of self-esteem and impairment of social skills) and have a tendency to become increasingly detached from society, to which almost all of them will eventually return. In the view of the CPT, the regimes which are offered to prisoners serving long sentences should seek to compensate for these effects in a positive and proactive way. The prisoners concerned should have access to a wide range of purposeful activities of a varied nature (work, preferably with vocational value; education; sport; recreation/association). Additional steps should be taken to lend meaning to their period of imprisonment; in particular, the provision of individualised custody plans and appropriate psychological and social support are important elements in assisting such prisoners to come to terms with their period of incarceration and, when the time comes, to prepare for release. Moreover, the provision of such a regime to life-sentenced prisoners enhances the development of constructive staff/inmate relations and hence reinforces security within the prison." (my emphasis)

Finally, the 2014 visit of the CPT to the KIA took place a few days after the effective release of the applicant from prison[13]. Like seven years before, the CPT continued to recommend that "the Aruban authorities take the necessary steps to redress the state of decay and dilapidation in the prison, including preventing further flooding. Further, the number of inmates accommodated in each cell should not exceed two. In addition, measures should be taken to provide artificial lighting in every cell and to fully partition the sanitary annexe in each cell." More specifically, it reiterated its recommendation that "activities for prisoners be developed, with a view to ensuring that all prisoners (including those on remand) [could] spend a

11. Report to the Government of the Netherlands on the visit to the Netherlands Antilles carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 to 29 January 1999, CPT/Inf (2000) 9.
12. Report to the authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe, Aruba, and the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in June 2007, CPT/Inf (2008) 2.
13. Report to the Government of the Netherlands on the visit to the Caribbean part of the Kingdom of the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 12 to 22 May 2014, CPT/Inf (2015) 27.

reasonable part of the day (i.e. 8 hours or more) outside their cells engaged in purposeful activities of a varied nature: work, preferably with vocational value; education; sport; recreation/association."

Being aware of these five detailed reports, the Government cannot claim that they did not receive clear guidance from the Council of Europe with regard to the proper solutions for the shortcomings of their prison policy in the Netherlands Antilles and, more precisely, in Koraal Specht prison and the KIA. Only a lack of political will can explain why the CPT's repetitive appeal over a period of thirty years has remained unheeded[14].

9. The Government's first defence is encapsulated in the form of a rhetorical question: "is it reasonable to measure the State's behaviour since 1980 to a standard that was introduced by the Court for the first time in 2013?" The Government's argument is that the obligation to promote resocialisation and set a review mechanism stems from *Vinter and Others* and therefore cannot be imposed in the present case. The Grand Chamber firmly rebuts this argument and finds explicitly that these positive obligations were binding on the respondent State already in 1980. From the imposition of his life sentence the applicant was entitled to have a prospect of release and the possibility of a review mechanism fulfilling the requirements flowing from the Convention. Paragraph 116 of the present judgment does not leave a shadow of doubt about the Grand Chamber's intention to assess the respondent State's conduct taking into account the entire period of Mr Murray's incarceration. Thus the Court does apply the obligation to promote resocialisation and set up a review mechanism to a period of incarceration starting in 1980. In so doing, the Grand Chamber's judgment does not proceed with a retroactive application of international legal standards, since these standards have been clear at European level since 1973 (see Resolution of the Committee of Ministers (73) 5 on Standard Minimum Rules for the Treatment of Prisoners), and even earlier than that at a global level (see United Nations Standard Minimum Rules for the Treatment of Prisoners, of 1955). To put it in a straightforward way, the Grand Chamber considers that *Vinter and Others* only restated penological standards that had been binding on member States of the Council of Europe since at least the nineteen-eighties.

10. The Government also argued that the applicant had not complained specifically about the lack of psychiatric treatment when he was detained. The Grand Chamber rejects this contention in the last two sentences of paragraph 124, which refer back to the principle posited in paragraph 106.

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14. This adverse political will is demonstrated in the notorious statement of the Dutch Deputy Minister of Security and Justice, of 16 April 2012: "Life imprisonment is life imprisonment. Return to society is excluded, unless in the exceptional case that a whole life prisoner is granted a pardon. For this reason, whole life prisoners do not qualify for activities aimed at reintegration." (see page 10 of the applicant's pleadings before the Grand Chamber).

As one of the most important practical aspects of the positive obligation of States Parties to protect the physical and psychological well-being of inmates under the Convention, the obligation to provide and implement an individualised sentence plan, including individual psychiatric and psychological treatment, is an obligation of result which is imposed on States Parties to the Convention, regardless of the inmate's wishes. The inmate should of course be encouraged to adhere to and cooperate with such a plan, but the fact that he or she rejects it or remains indifferent to it will not release the State from its duty to prepare, implement and review the individual sentence plan in any event. Failure to comply with this obligation will engage State responsibility.

Thus, the failure by Mr Murray to request proper psychiatric treatment or an adequate prison programme is totally irrelevant. According to the international standards referred to above, this lack of initiative on the part of the applicant evidently did not absolve the State of its responsibility, since it was bound by a compulsory international obligation that did not depend on his wishes.

11. Finally, the Grand Chamber also rejects the Government's argument that Curaçao and Aruba were one country within the Kingdom of the Netherlands and that the administration of justice was a responsibility of the separate parts of the Kingdom. This contention can easily be rejected on the basis of the doctrine enshrined in Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the United Nations International Law Commission in 2001), according to which the conduct of any State organ, be it that of the central government or of a territorial unit of the State, must be considered an act of that State under international law. It is neither Curaçao nor Aruba but the Kingdom of the Netherlands which is the Party responsible under the Convention for ensuring compliance with its standards. For this same reason, it is also irrelevant to claim, as the Government did, that there was no obligation to offer the applicant psychiatric treatment, since no such order was imposed by the sentencing court, the Joint Court of Justice. The compliance of the Dutch State's practice with the Convention does not hinge on the decisions of local courts of autonomous parts of the Kingdom.

12. In addition, the Court has already in the past given a clear indication that it would not accept this line of argument, when in *Mathew* it affirmed the duty to transfer an inmate from the KIA to a place more appropriate to his physical condition and health needs, "in one of the other two countries of the Kingdom if necessary"[15]. Nothing substantially different distances the present case from *Mathew*, in the view of the Grand Chamber. Thus it does not accept the Joint Court of Justice's argument, repeated by the respondent

15. *Mathew v. the Netherlands*, no. 24919/03, § 215, 29 September 2005. See also *Claes v. Belgium*, no. 43418/09, § 99, 10 January 2013.

Government, that the "limited intelligence" and "the insufficient ability to express himself" hindered Mr Murray's placement in a custodial clinic in the Netherlands[16]. If adequate treatment was not available in Curaçao, the applicant should have been sent to the Netherlands, where professional help could have been provided to him, if necessary with translation, using one of the three languages that he spoke: Papiamento, English or, with more difficulty, Dutch. Even less acceptable is the Government's argument presented in the Grand Chamber hearing that the applicant never requested a transfer to the Netherlands. Once again it must be stressed that the State's obligation did not have to be triggered by a request from the applicant; there was an obligation for the State to act of its own motion.

The State's obligation to provide for a parole mechanism

13. The Grand Chamber clarifies the *Vinter and Others* judgment with regard to the parole mechanism in clear-cut language, thus lending its authority to important Chamber judgments that have been delivered since *Vinter and Others*[17]. Although the Grand Chamber mentioned the freedom of Contracting Parties to decide on the concrete features of their own parole mechanisms, it also established clear limits to this freedom. According to paragraphs 99 and 100 of the present judgment, the parole mechanism must comply with the following five binding, "relevant principles":

(1) the principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation");

(2) the principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution;

(3) the principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review";

(4) the principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;

(5) the principle of judicial review.

In the light of these Convention requirements, which sit comfortably with Recommendation Rec(2003)22 of the Committee of Ministers to member States on conditional release (parole), Contracting Parties to the Convention

16. See the Joint Court of Justice of the Netherlands Antilles' argument in paragraph 15 of the present judgment.

17. Again for the sake of terminological clarity, I stress that I use the word parole in the same sense as the Council of Europe uses it, meaning conditional release or early release of sentenced prisoners under individualised post-release conditions; amnesties and pardons are not included in this definition, as Recommendation Rec(2003)22 of the Committee of Ministers has recognised.

must establish a mechanism of review of the justification of continued imprisonment according to the penological needs of the prisoner sentenced to a life or long-term prison sentence. The logical conclusion to be drawn from the above set of Convention principles is that, if a parole mechanism must be available to those convicted of the most heinous crimes, *a fortiori* it must be available to other prisoners. It would fly in the face of justice if offenders convicted of less serious offences could not be paroled whenever they are apt to reintegrate society, while such an opportunity would be afforded to offenders convicted of more serious crimes. Thus, in principle, the Convention guarantees a right to parole to all prisoners[18].

14. The Grand Chamber affirms that, as a matter of principle, the criteria on which to assess the appropriateness of parole must be established by law in a clear and foreseeable manner, as provided for by paragraph 10 of the Committee of Ministers Resolution (76) 2, paragraphs 3, 4 and 20 of the Committee of Ministers Recommendation Rec(2003)22, and paragraph 34 of the Committee of Ministers Recommendation Rec(2003)23, and, on the world stage, by Article 110 of the 1998 Statute of the International Criminal Court (Rome Statute) and Rule 223 (Criteria for review concerning reduction of sentence) of its Rules of Procedure and Evidence. The time when prison law was the realm of governmental discretion has long passed, since the terms, modalities and conditions of implementation of imprisonment and release belong to the core of the principle of legality as much as the conviction and sentencing of the offender. Thus, according to the Grand Chamber, the parole assessment criteria are not left to the discretion of the member States. The parole review mechanism must be based on "objective, pre-established criteria", namely those "legitimate penological grounds" explicitly established in paragraph 100 of the judgment. Beyond *Vinter and Others*[19], the authorities confirmed by the Grand Chamber are *Trabelsi v. Belgium*[20], *Laszlo Magyar v. Hungary*[21] and *Harakchiev and Tolumov v. Bulgaria*[22]. This means that prisoners have a vested and enforceable right to be paroled if and when the legal requisites of parole are present, not that all prisoners should necessarily be granted parole.

Although it notes that the balance between the different penological grounds is not "static" and may evolve in the course of the execution of the sentence, the Grand Chamber does not refrain from setting out the

18. The Grand Chamber has therefore finally departed from the unfortunate case-law according to which the Convention does not confer a right to parole (*Szabo v. Sweden* (dec.), no. 28578/03, ECHR 2006-VIII, and *Macedo da Costa v. Luxembourg* (dec.), no. 26619/07, § 22, 5 June 2012).
19. *Vinter and Others*, cited above, §§ 125 and 129.
20. *Trabelsi v. Belgium*, no. 140/10, § 137, ECHR 2014 (extracts).
21. *Laszlo Magyar v. Hungary*, no. 73593/10, § 57, 20 May 2014.
22. *Harakchiev and Tolumov*, cited above, §§ 255, 257 and 262.

penological ground which should prevail in the assessment of the prisoner's evolving situation: the principle of resocialisation. Thus, the logical inference from the Grand Chamber's reasoning is that, in case of conflict between different penological grounds, as for example, when the resocialisation purpose of the penalty has been achieved but there may still be a pure retributive justification for continued incarceration, the "prisoner's progress towards his or her rehabilitation" should carry the most weight in the evaluation of the needs for the continued detention. Most importantly of all, the Grand Chamber restates that penological grounds do not equate to, and should not be confused with, "compassionate grounds for reasons of health related to ill-health, physical integrity and old age" (paragraph 100). The relevant assessment criteria should not be limited to the prisoner's mental or physical infirmity or to his or her closeness to death. Such "compassionate grounds" are clearly too restrictive.

15. According to the Grand Chamber, the parole review must take place within a pre-determined, reasonable timeframe, as paragraph 9 of the Committee of Ministers Resolution (76) 2 has long established and paragraph 5 of the Committee of Ministers Recommendation Rec(2003)22 and, at the global level, Article 110 §§ 3 and 5 of the Rome Statute have reiterated. In case parole is not determined in the initial review, the prisoner's situation should be reviewed at reasonable, not too widely spaced intervals, as also indicated by paragraph 12 of Committee of Ministers Resolution (76) 2, and paragraph 21 of Committee of Ministers Recommendation Rec(2003)22. In order to reach such a decision, the authority invoked by the Grand Chamber is *Bodein v. France*[23].

16. Finally, according to the Grand Chamber, the parole mechanism must be under the authority of a court or at least subject to full judicial review of both the factual and the legal elements of the parole decision, as also provided by the universal standard established in Article 110 § 2 of the Rome Statute[24]. By elevating the statements of *Laszlo Magyar*, § 57, and *Harakchiev and Tolumov*, §§ 258 and 262, to the pinnacles of a Grand Chamber statement on the "relevant principles", the judges of the Grand Chamber unanimously reject any parole mechanism that reserves to a governmental or administrative authority the last word on sentence review which would put the continued incarceration of the prisoner in the hands of the executive and circumvent the ultimate responsibility of the judiciary, thus entrusting judicial powers to the executive and breaching the principle of separation of powers. Hence, a review by a governor, a minister or any

23. *Bodein v. France*, no. 40014/10, § 61, 13 November 2014.

24. See paragraph 100 of the judgment. The use of the imperative "should" reflects in a straightforward way the intention of the Grand Chamber to impose the principle of judicial supervision of parole decisions, according to which the prisoner's right to know what he or she must do to be considered for release, and under what conditions, has to be safeguarded by the guarantee of judicial review.

official of the administration is not sufficiently independent to comply with the European human rights standards[25].

Moreover, decisions to keep prisoners in or recall them to prison must be taken with all procedural guarantees of fairness, such as the guarantee of a reasoned decision[26]. The implicit conclusion to be drawn from this strong statement of principle by the Court is that the parole mechanism should also include an oral hearing of the prisoners and adequate access to their files, along the lines of paragraph 32 of Committee of Ministers Recommendation Rec(2003)22, Article 110 § 2 of the Rome Statute and Rule 224 of its Rules of Procedure and Evidence. Otherwise the fairness of the review procedure would be a mirage.

To sum up, having established the above-mentioned mandatory, "relevant principles", the Grand Chamber of the Court has reached in *Murray* a point of no return in its standard-setting function of protection of human rights of prisoners in Europe. The Netherlands Antilles pardons system is similar to the Cypriot system of adjustment of a life sentence, being on the President's discretion, subject to the agreement of the Attorney-General[27]. One has to recall that in the Cypriot system there was no obligation to inform a prisoner of the Attorney-General's opinion on his or her application for early release or for the President to give reasons for refusing such an application. Furthermore, there was no published procedure or criteria governing the operation of the procedure. Lastly, a refusal to order a prisoner's early release was not amenable to judicial review. In the "relevant principles" of *Murray*, the Grand Chamber takes, in substance, a very critical stance against such a discretionary and opaque system. Europe has evolved since *Kafkaris* and evidently the Court has evolved with it. *Vinter and Others* has a worthy successor in *Murray*.

The application of the European standards to the present case

17. Mr Murray was kept in detention for more than thirty-four years without any kind of psychiatric or psychological treatment, irrespective of the clearly stated need for such treatment[28]. The Government were asked to

25. The same principle already stemmed from *Weeks v. the United Kingdom*, no. 9787/82, §§ 58 and 69, Series A no. 114, and *T. v. the United Kingdom* [GC], no. 24724/94, § 121, 16 December 1999.

26. See paragraph 100 of the judgment. The use of "may" when referring to reasons that are to be provided in order for the prisoner to know what he or she must do to be considered for release, and under what conditions, should not be misunderstood. Reasons are required whenever release is denied or the recall of a released prisoner is decided, but reasons are not required in the opposite circumstances, i.e., when release is decided or recall of a released prisoner is denied.

27. *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008.

28. Already in 1979, a psychiatric report stated that "he should be placed in a custodial clinic for psychopaths to undergo a rather lengthy treatment under very strict surveillance".

provide all psychiatric reports relating to the assessment of the applicant's mental needs. They produced four psychiatric reports, of 11 October 1979, 10 February 1994, 21 July 2012 and 17 August 2012, and a "letter" from a psychiatrist of 6 September 1991. This means that until the review procedure initiated in accordance with the new provisions of the Curaçao Criminal Code, only two psychiatric reports and a psychiatrist's "letter" had been issued. Two psychiatric reports in the period between 1980 and 2012 – this was the extent of the professional psychiatric care that the applicant received in twenty-two years of incarceration. As the Joint Court of Justice concluded, in its judgment of 21 September 2012, while evaluating the applicant's risk of recidivism existing at the time of the imposition of the sentence in 1980 and during the period of incarceration, "since then no treatment in any shape or form ha[d] taken place". Clearer than this the Antillean judges could not have been. Understandably, the judges of the Grand Chamber of this Court cannot reach a different conclusion in paragraph 122 of the present judgment, which acknowledges that Mr Murray received no treatment at all during his incarceration.

18. In addition to the lack of a proper prison programme adapted to Mr Murray's personal needs, the fact remains that there was no proper review mechanism in Curaçao until November 2011 that met the requirements of the Court's case-law and the European penological standards. The majority deliberately choose not to address this aspect of the case in paragraph 126, although they set out the "relevant principles" for that purpose in the earlier paragraphs 99 and 100. The pardons system in force in the former Netherlands Antilles provided no lawful, objective, penological criteria for the sentence review, no time-frame for the review, no judicial oversight, no obligation to give reasons for the governor's decision not to grant a pardon and no oral hearing of the inmate. No updated medical opinions or psychiatric reports on the state of the applicant's mental health or information from the prison authorities was gathered and put at the disposal of the Procurator General or the Joint Court of Justice. Everything fell within the discretion of the Governor, who was entirely free not to follow the Public Prosecution Service's submission or the Joint Court of Justice's advice in favour of release[29].

On that basis, in its 11 March 1980 judgment, the Joint Court of Justice of the Netherlands Antilles itself acknowledged that the imposition of a TBS order for confinement in a custodial clinic "would be the most appropriate measure in this case".

29. The same conclusion is valid for the pardons system under Article 93 of the new Curaçao Constitution, which entered into force on 10 October 2010. It should be noted in this context that, on 8 November 2013, the Constitutional Court of Sint Maarten, part of the Kingdom of the Netherlands, delivered a judgment on, among other issues, the possibility of imposing life sentences, considering that life-sentenced prisoners must have both a possibility of review and a prospect of release. The constitutional judges even cited the Grand Chamber judgment of *Vinter* to support their negative evaluation of the Sint Maarten legal provisions, similar to those existing in Curaçao until 2011. As the new Criminal Code

In fact, Mr Murray presented thirteen requests for release, which were either refused without any reasons or not even answered[30]. He was finally diagnosed with cancer in early 2013. On 2 September 2013 he was brought back to the Curaçao prison, with a view to facilitating his health treatment. After the intervention of the Court in response to a request for an interim measure, the applicant was placed in a nursing home in Curaçao, with two guards at his door. For surgery it was too late. Since treatment in prison was no longer an option, he was pardoned by the Governor only on 31 March 2014, entailing the remission of the rest of his prison sentence, and thus allowing him to die in a dignified manner in the presence of his family in Aruba. Even then, the applicant was left to his own devices. It was his sister, with her small pension, who had to pay for his nursing[31].

19. The majority also consciously refrain from evaluating the compatibility of the new periodic review mechanism, which entered into force in Curaçao on 15 November 2011. Although this new regime was introduced after the application was lodged with the Court, its evaluation was evidently necessary, because the applicant was kept in detention until 31 March 2014, following a judgment of the Joint Court of Justice of 21 September 2012, which applied the new provisions of Article 1:30 of the Criminal Code of Curaçao. Thus, the applicable rules on periodic review of life sentences between 15 November 2011 and 31 March 2014 should have been assessed by the Court.

While the guarantees of judicial review no later than twenty years after the deprivation of liberty and every five years thereafter, of an adversarial procedure, of an oral hearing of the prisoner, of access to the files, and of a reasoned decision, are major improvements to the Curaçao legal framework, the fact that the review criteria are not sufficiently determined in paragraph 1 of Article 1: 30 ("any reasonable purpose") is problematic from a European human rights perspective. Too much discretion is allowed in the formulation of the review criteria. There is no way in which a life prisoner can know what he or she should do to be considered for release and under what conditions. The additional concretisation in paragraph 2 of these criteria, with the reference to the opinion of the victim or of the surviving close relatives and the risk of recidivism, does not suffice to satisfy the requirements of the principle of legality. On the contrary, the fact that the

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of Sint Maarten lacked any provision for such a review and the Government were not willing to undertake that a pardon would be granted in such a case, the Constitutional Court found itself compelled to strike down a number of provisions on life sentences (see the Dutch text of the decision on the website of the *Ombudsman of Sint Maarten*). This important case-law, which was ignored by the respondent State, shows that not only were the Sint Maarten constitutional judges attentive to *Vinter*, they were also prepared to draw all the logical conclusions from the Grand Chamber's findings in that case.

30. See paragraph 23 of the judgment.

31. See paragraphs 13 and 16 of the applicant's observations of 10 August 2014, not contested by the Government.

position of the victims or their relatives is included in the examination of the question whether the continued execution of a life sentence can still be justified confuses the assessment of legitimate penological grounds with an exercise of quenching the victims' – or their relatives' – thirst for revenge. By concentrating on the need for revenge and resentment, this policy attributes a predominant role to the worst possible form of retribution: a blind, visceral, "just deserts" feeling on the part of the victims or their relatives. The offender will have to "rot in jail" as long as the victims or their relatives deem their thirst for revenge unquenched, even though he or she may be ready to live a law-abiding life in society.

Worse still, this policy obviously detracts from the State's obligation to provide the proper means for victims of crime to recover from their loss. The less the State fulfils its obligation towards the victims or their relatives, the more inclined they will be to compensate for their loss with a need to prolong the offender's incarceration. Although "rehabilitated", the prisoner may be kept in continued detention as a scapegoat for the State's failure to attend to the needs of the victims or their relatives. In fact, that is exactly what happened in the present case: the Joint Court of Justice found, in its judgment of 21 September 2012, that, since the victim's relatives had never received adequate psychological care, the applicant's release would shock them very much. Furthermore, it even considered that the act that he had allegedly threatened them with in 1979, i.e. 23 years before, could still contribute to their feelings of insecurity.

20. After the successive decisions of refusal of the applicant's thirteen requests for pardon, the judgment of the Joint Court of Justice of 21 September 2012 insisted on the risk of recidivism due to his "disturbed personality". Mr Murray could not be released simply because, as the Antillean judges admitted, he had never had a chance to undergo psychiatric treatment. The only possible solution for his resocialisation would have been to provide him with proper psychiatric treatment, which was not even tried. In other words, the State refuses parole until one is capable of leading a law-abiding life in society, which can only happen if the prisoner is provided with proper psychiatric treatment by the State, but the same State withholds this treatment. This is a typical "Catch 22" situation: the State imposes a condition for release but denies the prisoner the means of satisfying the condition. In this context, realistically speaking, the outcome of any review by the Governor or the Joint Court of Justice was nothing but a foregone conclusion[32].

32. The present case provides another patent demonstration that a categorical rule against life imprisonment is called for in European human rights law. The universal acknowledgment of the principle of resocialisation of offenders sentenced to prison and the emerging consensus on the prohibition of life imprisonment for mentally fit offenders so require (see my separate opinion in the case of *Öcalan v. Turkey (no. 2)*, cited above). Hopefully the Court will dare one day to read the signs of the times and take the additional

Conclusion

21. However heinous the crime committed, no prisoner deserves to be treated like forgotten "human waste", to use the words of the Court's former President Jean-Paul Costa[33]. That is what happened to the applicant James Murray. The lack of psychiatric treatment rendered his life sentence *de facto* irreducible. The Article 3 violation was aggravated by the existence of a discretionary and opaque pardons system, at the time the sentence was imposed, which did not meet the Convention requirements and was of no help to the applicant. The newly introduced periodic review mechanism under Article 1:30 of the Criminal Code of Curaçao, which did not provide him relief either, is also problematic with regard to the lack of foreseeability of the grounds for review of the sentence and the predominant role that it attributes to a purely retributive, revenge-oriented penal policy.

Justice came too late for Mr Murray. He did not survive the ordeal of thirty-four years of inhuman incarceration. Although he could not benefit from compensation for the non-pecuniary damage that he endured, it would have been an act of justice to award such compensation to his heirs.

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step of rejecting life sentences for mentally fit offenders as a frontal breach *per se* of Article 3 of the Convention.

33. See President Costa's separate opinion in *Leger v. France*, no. 19324/02, 11 April 2006.

JOINT PARTLY DISSENTING OPINION OF JUDGES SPIELMANN, SAJÓ, KARAKAŞ AND PINTO DE ALBUQUERQUE

(Translation)

We voted against point 3 of the operative provisions, to the effect that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicant, as concluded by the majority.

We would note, at the outset, that the fact that the applicant died on 26 November 2014, in the course of the proceedings, should not have precluded an award of just satisfaction on the basis of any non-pecuniary damage sustained. The Court has previously awarded just satisfaction for non-pecuniary damage in cases where the applicant died during the proceedings (see, in particular, in the context of a violation of Article 3, the judgments in *Avcı and Others v. Turkey*, no. 70417/01, 27 June 2006, and *Keser and Kömürcü v. Turkey*, no. 5981/03, 23 June 2009; and, in other contexts, *Ernestina Zullo v. Italy* [GC], no. 64897/01, 29 March 2006; *Jėčius v. Lithuania*, no. 34578/97, ECHR 2000-IX; *Reynolds v. the United Kingdom*, no. 2694/08, 13 March 2012; and *Benkő and Soósné Benkő v. Hungary*, no. 17596/12, 8 July 2014).

The present case has allowed the Grand Chamber to develop and clarify its case-law concerning irreducible life sentences. It was the lack of arrangements adapted to the applicant's state of health which characterised this case. The applicant did not receive psychiatric treatment such as to give him a possibility of rehabilitation or a prospect of release. In paragraphs 105 to 112 of the judgment, the Court sets out its case-law principles concerning health care provided to prisoners, particularly to lifers with mental health problems. Applying those principles to the present case, and to arrive at the conclusion that the applicant's life sentence was not *de facto* reducible, the Court finds that he was not given any kind of treatment and there was not even an assessment of treatment needs and possibilities (see paragraph 125).

The present case can thus be distinguished from that of *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013), and it is for that reason that we find that the Court should have made an award in respect of the non-pecuniary damage sustained by the applicant.