



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

FIRST SECTION

CASE OF MARCELLO VIOLA v. ITALY (No. 2)

(Application no. 77633/16)

JUDGMENT

STRASBOURG

13 June 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Marcello Viola v. Italy (no. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President*,

Ksenija Turković,

Guido Raimondi,

Krzysztof Wojtyczek,

Armen Harutyunyan,

Pauliine Koskelo,

Gilberto Felici, *judges*,

and Renata Degener, *Deputy Section Registrar*,

Having deliberated in private on 30 April 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 77633/16) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Marcello Viola (“the applicant”), on 12 December 2016.

2. The applicant was represented by Mr A. Mascia, a lawyer practising in Verona, and by Ms B. Randazzo and Mr V. Onida, lawyers practising in Milan. The Italian Government (“the Government”) were represented by their former Agent, Ms E. Spatafora, and by their co-Agent, Ms M. Aversano.

3. The applicant alleged that he had been sentenced to an irreducible term of life imprisonment, which he considered inhuman and degrading.

4. On 30 May 2017 the Government were given notice of the complaints under Articles 3 and 8 of the Convention and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Third-party comments were received from the *L’altro diritto onlus* documentation centre of the University of Florence, the European Prison Litigation Network, and a group of academics and experts coordinated by the University of Milan, all of whom had been given leave by the President to intervene as third parties in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a) of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1959 and is currently detained in Sulmona Prison.

7. Between the mid-1980s and October 1996 (a period known as the *seconda faida di Taurianova*) he was implicated in a series of events involving the Radicena mafia clan (*la cosca Radicena*) and the rival Iatrinoli clan (*la cosca Iatrinoli*).

A. The criminal proceedings against the applicant

8. The first set of criminal proceedings against the applicant and other defendants, known as the “Marcello Viola + 24” trial (criminal case no. 144/92), covered events between January 1990 and March 1992. In particular, it identified the perpetrators of four killings that had taken place on 3 May 1991 (“Black Friday”) and shed light on the networks of two mafia clans that were competing for control over the town of Taurianova and the surrounding areas.

9. On 16 October 1995 the Palmi Assize Court sentenced the applicant to fifteen years’ imprisonment for membership of a mafia-type criminal organisation. The fact that he was the head of the mafia group and the instigator (*promotore*) of its criminal activities was taken into consideration by the court as an aggravating circumstance. With regard to the nature of the links to mafia organisations, the Assize Court highlighted several factors including “the close ties between members, the internal hierarchy, the different roles and tasks assigned to members, the control over territory, the unspecified criminal design, the practice of intimidation and, in a more modern approach, not just the harassment of businesses but also direct participation in the area’s economy through effective control over legal economic activities.”

10. In judgment no. 3 of 10 February 1999 (deposited with the registry on 29 March 1999), the Reggio Calabria Assize Court of Appeal upheld the applicant’s conviction but reduced the sentence to twelve years’ imprisonment. The applicant did not appeal on points of law.

11. The second set of proceedings against the applicant and other defendants, known as the “Taurus trial” (criminal cases nos. 1/97 – 12/97 – 18/97) concerned other facts relating to the criminal activities of the two Taurianova clans. On 22 September 1999 the Palmi Assize Court, in judgment no. 10/99, sentenced the applicant to life imprisonment. The judgment was upheld by the Reggio Calabria Assize Court of Appeal on 5 March 2002. In particular, the applicant was found guilty of the offence of membership of a mafia-type criminal organisation within the meaning of

Article 416 *bis* of the Criminal Code, and of other offences (murder, abduction and false imprisonment resulting in the victim's death, and unlawful possession of firearms), aggravated by "mafia-type" circumstances as set out in section 7 of Decree-Law no. 152 of 13 May 1991, converted into a Law on 12 July 1991 (Conversion Law no. 203/1991). The applicant's role as head of the criminal organisation and the instigator of its activities was also taken into consideration as an aggravating circumstance in his case.

Applying the rules concerning a "continuing offence" (*reato continuato*), the Assize Court of Appeal sentenced the applicant to life imprisonment, with two years' daytime isolation.

12. The applicant lodged an appeal on points of law which was dismissed on 26 February 2004.

13. After the applicant had submitted a request for fresh determination of the overall prison sentence, based on the alleged continuity between the facts giving rise to the "Marcello Viola + 24" trial (judgment of 10 February 1999) and those in issue in the "Taurus" trial (judgment of 5 March 2002), the Reggio Calabria Assize Court of Appeal, in a ruling of 12 December 2008, found that the criminal design was one and the same, and recognised the continuity between the facts in issue in the two sets of proceedings. The overall sentence was therefore recalculated and set at life imprisonment, with daytime isolation for a period of two years and two months.

B. The applicant's detention

14. Between June 2000 and March 2006 the applicant was detained under the special prison regime provided for in section 41 *bis*, subsection 2, of Law no. 354 of 26 July 1975 (hereafter "section 41 *bis*"). That provision gives the prison authorities the power to suspend application of the ordinary prison regime in whole or in part for reasons of public order and safety.

15. In particular, on 14 December 2005 the Ministry of Justice issued an order extending the "41 *bis*" regime for one year in the applicant's case. The applicant appealed against the order to the L'Aquila Sentence Supervision Court, complaining of a lack of reasons for the order, which he alleged was based on information that did not reflect his actual situation at the time, and maintaining that he had severed his ties to the mafia organisation.

16. In an order of 14 March 2006 the Sentence Supervision Court allowed the applicant's request and ended the application of the special prison regime in his case. The court reiterated that the "41 *bis*" regime did not require the prisoner to prove that he or she had severed links to the mafia organisation, as the burden of proof lay with the authorities. In the court's view, it was for the latter to provide reasons, based on detailed, specific and current factual information, indicating that the prisoner in question still had contact with the mafia organisation.

The Sentence Supervision Court found that in the instant case the authorities had simply observed that the criminal organisation in question was still active and that the applicant had not shown any signs of striving for rehabilitation, nor had he displayed any willingness to cooperate with the judicial authorities. The court noted that the authorities had not provided any specific evidence that the applicant was able to maintain contact with the organisation in question, and found that the order had not taken sufficient account of the progress he had made towards rehabilitation.

17. The applicant subsequently made two requests for prison leave (*permesso premio*), a measure granted to prisoners in specific circumstances (see paragraph 34 below).

18. His first request was refused by the L'Aquila post-sentencing judge on 13 July 2011. In the reasoning of his decision, the judge observed that prison leave could not be granted to individuals sentenced to life imprisonment for one of the offences referred to in section 4 *bis* of Law no. 354 of 26 July 1975 (hereafter "section 4 *bis*") in the absence of "cooperation with the judicial authorities" within the meaning of section 58 *ter* of the same Act (hereafter "the Prison Administration Act").

19. The applicant lodged an appeal against that decision with the L'Aquila Sentence Supervision Court, citing the progress he had allegedly made towards rehabilitation and contending that he had severed his links with mafia circles. He also raised a question of constitutionality concerning section 4 *bis*, in so far as the latter made no provision for prison leave to be granted to life prisoners who had not cooperated with the judicial authorities and whose situation did not make cooperation "impossible" or "unenforceable", but who had made progress towards rehabilitation and maintained their innocence, and in respect of whom there was reliable evidence ruling out any links to the criminal organisation.

20. In order no. 22/12 of 29 November 2011 (published on 9 January 2012), the Sentence Supervision Court refused the request for prison leave on the grounds that the condition of "cooperation with the judicial authorities" was not satisfied.

Regarding the constitutionality of section 4 *bis*, the court considered, before ruling on the merits of the question, that it was first necessary to determine whether the other criteria governing eligibility for prison leave were satisfied. In particular, the court focused its assessment on the existence of positive evidence ruling out any current links with the criminal organisation.

21. The court specified at the outset that the order of 14 March 2006 (see paragraph 16 above) lifting the "41 *bis*" prison regime had no legal implications for the proceedings at hand, as the judges' assessment concerned two different situations. In the view of the Sentence Supervision Court, the 2006 order had concerned the determination of whether or not the applicant was capable of maintaining links with the mafia organisation

while in prison, whereas in the proceedings at hand the aim was to ascertain whether it could be established with certainty that the applicant no longer had links to the criminal organisation.

22. In the case before it the Sentence Supervision Court considered that the severing of those links had not been positively established. On the contrary, it noted that the mafia group was still active in the Taurianova area, that the applicant had been the acknowledged head of a criminal organisation and that it was not apparent from the observation of his day-to-day conduct that he had engaged in a critical appraisal of his criminal past. Accordingly, the court rejected the applicant's request without examining the merits of the question of constitutionality raised by him. The court's order was upheld by the Court of Cassation on 7 November 2012 (judgment no. 3107/12).

23. The second request for prison leave was refused by the L'Aquila post-sentencing judge on 4 June 2015 and by the L'Aquila Sentence Supervision Court on 13 October 2015, on the grounds of failure to cooperate with the authorities.

24. In the meantime, in March 2015, the applicant had submitted an application to the L'Aquila Sentence Supervision Court for conditional release under Article 176 of the Criminal Code. He pointed to his progress towards rehabilitation in prison as noted in observation reports dated 1 March 2011, 20 August 2014 and 27 January 2015, to the absence of any links to organised crime and to his inability to obtain a reduction of sentence through early release (according to the applicant, he had accrued entitlement to over 1,600 days by the date of submission of the application). He also maintained that, owing to the existence of the aggravating circumstance taken into consideration in the judgments convicting him, based on his role as head of the criminal organisation, there was no prospect that cooperation would be deemed in his case to be "impossible" or "unenforceable" within the meaning of section 4 *bis* of the Prison Administration Act. Lastly, he requested the Sentence Supervision Court to raise a question as to the constitutionality of section 4 *bis* in relation to Article 27 § 3 of the Constitution and Article 117 § 1 of the Constitution read in conjunction with Article 3 of the Convention.

25. In a decision of 26 May 2015 the Sentence Supervision Court rejected the application for conditional release, observing that the applicant had been convicted of membership of a mafia-type criminal organisation and of other offences committed through intimidation based on links to the mafia or with the aim of contributing to the organisation's activities (section 7 of Decree-Law no. 152 of 13 May 1991, converted into Law no. 203 of 12 July 1991). According to the court, as the applicant had committed offences covered by section 4 *bis*, he was not eligible for conditional release if he had not cooperated with the judicial authorities; in his case, such

cooperation was neither “impossible” nor “unenforceable” within the meaning of subsection 1 *bis* of the above-mentioned section.

26. As to the question of constitutionality raised by the applicant, the court held that the provision in issue was consistent with the principles derived from Article 27 § 3 of the Constitution. After referring to the case-law of the Constitutional Court and the position taken by the Court in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts)), the Sentence Supervision Court stated that the legislation afforded prisoners sentenced to life imprisonment for one of the offences referred to in section 4 *bis* a practical possibility of release which demonstrated that the sentence had achieved its aim and that the convicted offender could reintegrate into society. According to the court, that possibility was subject to a specific requirement for the prisoner concerned to have permanently severed his or her links with mafia circles; this had to be manifested in practice through meaningful cooperation with the judicial authorities.

27. The applicant appealed on points of law against that decision, arguing in particular that the provision establishing an automatic statutory mechanism preventing “non-cooperating” prisoners from being granted conditional release was unconstitutional.

28. In judgment no. 1153/16 of 22 March 2016 (published on 1 July 2016), the Court of Cassation dismissed the applicant’s appeal. With regard to the question of constitutionality he had raised, it pointed to the case-law of the Constitutional Court, and in particular judgment no. 135/2003, according to which the fact of making conditional release contingent on cooperation with the judicial authorities did not run counter to the rehabilitative purpose of the sentence. According to the Constitutional Court, convicted prisoners were free to choose whether to cooperate with the judicial authorities and were not subjected to any form of coercion.

As to the applicant’s claim to be innocent, the Constitutional Court referred to another ruling of the same court (no. 306/1993), in which it had held that the section 4 *bis* regime did not adversely affect convicted prisoners who protested their innocence, as this circumstance had legal relevance only in the context of a retrial. Lastly, the Court of Cassation stressed the absolute nature of the presumption of dangerousness to society in the absence of cooperation with the judicial authorities. In the court’s view, the legislature was free to lay down conditions for the release of prisoners who had been convicted of particularly serious offences such as those linked to mafia-type activities. Persons serving a life sentence under section 4 *bis* posed a greater risk on account of the offence they had committed rather than their individual personality. That being so, it was legitimate for the legislature to require positive evidence that the person concerned had permanently severed contact with the mafia group in question.

II. RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Positive law

1. *The Constitution*

29. Article 27 § 3 of the Italian Constitution provides that punishments must not be inhuman and must be aimed at rehabilitating the convicted offender.

2. *The Criminal Code*

30. The provisions of the Criminal Code of relevance to the present case read as follows :

Article 22 – Life imprisonment (*ergastolo*)

“*Ergastolo* is a life sentence, to be served in one of the specially designated prisons ...

Persons sentenced to life imprisonment may be authorised to work outside prison.”

Article 176 – Conditional release

“Persons sentenced to imprisonment whose conduct while serving their sentence demonstrates that they have repented may be considered for conditional release if they have already served at least thirty months or, in any event, half of the sentence where the remainder of the sentence [to be served] is not more than five years.

...

Persons sentenced to life imprisonment may be considered for conditional release when they have served at least twenty-six years in prison.

Eligibility for conditional release shall depend on the performance of the civic duties arising out of the criminal offence, unless the convicted prisoner can prove that it is impossible for him or her to comply with those duties.

Article 416 *bis* – Membership of a mafia-type organisation

“Any person who is a member of a mafia-type organisation of three or more persons shall be liable to imprisonment.

Persons who promote, lead or manage [such an] organisation shall be liable to between twelve and eighteen years’ imprisonment on this account alone.

An organisation is of a mafia type if its members use the intimidatory power of the bonds of membership and the resulting vows of obedience and silence in order to commit an offence, to acquire (directly or indirectly) the management, or other form of control, of economic activities, licences, permits, public contracts or services or to gain unfair advantages or profits for its members or other persons, or to prevent or hinder the free exercise of the right to vote, or to secure votes for members or other persons in elections ...”

3. *The Prison Administration Act*

31. Law no. 354 of 26 July 1975 (*legge sull'ordinamento penitenziario*, “the Prison Administration Act”), regulates the treatment of prisoners and the execution of measures entailing deprivation or restriction of liberty. The first subsection of section 1 provides that treatment in prison must be consistent with the principles of humanity and personal dignity.

32. The regime of life imprisonment known as *ergastolo ostativo* is the result of the legislative reform introduced by Law no. 356 of 7 August 1992 (converting Decree-Law no. 306 of 8 June 1992). It is based on a combined reading of Article 22 of the Criminal Code and sections 4 *bis* and 58 *ter* of the Prison Administration Act. According to those provisions, persons who do not “cooperate with the judicial authorities” are not entitled to conditional release or to other adjustments of sentence.

Section 4 *bis* deals more specifically with the ban on eligibility for sentence adjustments, and with the verification of dangerousness to society, in relation to a particular category of prisoners. The parts relevant to the present case read as follows:

“1. Permission to work outside prison [section 21], prison leave [section 30 *ter*] and the alternatives to detention provided for in Chapter VI [of Title I], with the exception of early release [section 54], may be granted to prisoners and persons held in compulsory confinement for the following offences, only in cases where the person concerned has cooperated with the judicial authorities for the purposes of section 58 *ter* of the present Act: offences committed for the purpose of terrorism, including international terrorism, or subversion of the democratic order through acts of violence; any of the offences dealt with in Articles 416 *bis* and 416 *ter* of the Criminal Code or offences taking advantage of the conditions laid down by that Article or committed with the aim of facilitating the activities of the organisations referred to therein ...

1 *bis*. The sentence adjustments referred to in subsection 1 may also be granted to prisoners or persons held in compulsory confinement for the above-mentioned offences, provided that evidence exists ruling out any current ties to organised crime, terrorism-related crime or subversive crime, where the person’s limited involvement in the offence as established by the judgment convicting him or her, or thorough verification of the facts and respective responsibilities as established by a final ruling, make meaningful cooperation with the judicial authorities in any event impossible, or where the cooperation offered is not objectively relevant and where one of the mitigating circumstances referred to in Article 62, no. 6 ..., Article 114 or Article 116 § 2 of the Criminal Code applies to the prisoner or person held in compulsory confinement.

...”

33. Section 58 *ter* of the Act, which deals with “cooperation with the judicial authorities”, provides:

“1. The maximum sentences laid down in sections 21(1), 30 *ter* (4) and 50(2) [of Law no. 354/1975] for persons convicted of one of the offences referred to in subsections 1, 1 *ter* and 1 *quater* of section 4 *bis* shall not apply to those who, even after being convicted, have [made efforts] either to prevent any further consequences of the offence or to provide the police or judicial authorities with evidence that is

decisive for the establishment of the facts and for the identification and arrest of the perpetrators of criminal offences.

2. The conduct referred to in subsection 1 shall be assessed by the sentence supervision court after obtaining the requisite information and hearing evidence from the public prosecutor's office attached to the judicial body with jurisdiction in respect of the offences to which the cooperation relates."

34. Section 21 and section 30 *ter* of the Act deal respectively with permission to work outside prison (*lavoro esterno*) and prison leave (*permessi premio*). In particular, section 30 *ter* provides for the possibility of granting prisoners who have demonstrated good behaviour (*condotta regolare*) in prison, and who do not pose a danger to society, a maximum of fifteen days' prison leave. Depending on the seriousness of the offence, the prisoner concerned must have served a certain period of time in prison in order to qualify for such a measure. The assessment as to whether the prisoner poses a danger to society is a matter for the post-sentencing judge, who must consult the prison authorities.

35. Chapter VI of Title I of this Act lists the full range of alternatives to detention, including probation (*l'affidamento in prova ai servizi sociali*), home detention, a semi-custodial regime (*semilibertà*), and early release. In particular, section 54 provides for "early release", which allows prisoners who can demonstrate that they have followed the rehabilitation programme to have their sentence reduced by forty-five days for each six-month period served.

36. As regards conditional release, section 2(1) of Decree-Law no. 152 of 13 May 1991 (amended by Conversion Law no. 203 of 12 July 1991) provides that "prisoners convicted of the offences referred to in the first subsection of section 4 *bis* of the [Prison Administration] Act may be considered for conditional release only if the conditions stipulated [in the Act] for the granting of the other statutory adjustments of sentence have been satisfied."

B. Constitutional case-law

37. Constitutional Court judgment no. 12 of 4 February 1966 provided an interpretation of Article 27 § 3 of the Constitution which clarified the balance to be struck between the different functions assigned to punishment. The relevant parts of the judgment read as follows:

"... the provision in question [Article 27 § 3] does not confine itself to stating purely and simply that 'the punishment should be aimed at rehabilitating the convicted offender'. On the contrary, it states that 'the punishment may not constitute treatment contrary to the principle of humanity and must be aimed at rehabilitating the offender': these elements clearly form a single indissociable whole ... Furthermore, the two parts of the sentence are united in logical terms and not just in terms of their literal meaning. On the one hand, the treatment of offenders based on the principle of

humanity is necessary for rehabilitation, and on the other hand rehabilitative action is the expression of humane and civilised treatment ...

When the norm is thus defined as a whole, its true value emerges. In view of its constitutional significance, the rehabilitation of convicted offenders must always be seen in the context of the actual treatment of offenders. That, moreover, is the legislature's true objective ... The legislature sought to assign limits to punishment, designed mainly to ensure that its retributive aspect did not exceed the threshold beyond which it would be contrary to the principle of humanity.

Hence, the true content of the rehabilitative principle is established. It must interact with the other functions of punishment and, accordingly, cannot be construed in an absolute and exclusive manner. Rehabilitation is certainly the aim, but in the context of the treatment of offenders ...

Furthermore, the scope and limits of the rehabilitative function enshrined in the Constitution emerge from this Article itself, when it states that the punishment 'should be aimed at' rehabilitating the offender. This phrase, taken in both its literal and logical sense, merely articulates the legislature's duty to be mindful of the rehabilitative aim and to put in place the tools needed to achieve it ...

In sum, in enacting the above-mentioned constitutional norm, [the constitutional legislature] sought to give the rehabilitative function of punishment the status of a constitutional principle without denying the existence and legitimacy of punishments that do not incorporate, or only partly incorporate, this aim. This takes account of the other functions of punishment, which ... are also vital to the protection of citizens and of the legal system ..."

38. Since judgment no. 313 of 4 July 1990 the Constitutional Court's rulings have tended to attribute a more central role to the resocialisation function of punishment, stating that this function must be a part of the punishment from its normative inception until the sentence has been served. Accordingly, this function must guide the actions of the legislature, the trial courts, the post-sentencing courts and the prison authorities (see also judgments nos. 343/1993, 422/1993, 283/1994, 341/1994, 85/1997, 345/2002, 257/2006, 322/2007, 129/2008 and 183/2011).

39. The constitutionality of section 4 *bis* was specifically addressed by the Constitutional Court in judgment no. 306 of 11 June 1993. The court reiterated the criminal-policy choices made by the legislature, observing how the latter, by making eligibility for conditional release and all other sentence adjustments dependent on cooperation by the prisoner concerned, had given express priority to general prevention and the protection of the community through a requirement for the members of mafia organisations to cooperate, something which represented an essential tool for the prosecuting authorities in combating organised crime.

The Constitutional Court also held that, while cooperation with the judicial authorities entailed a presumption that the individual concerned had "dissociated" him or herself from mafia circles, and constituted an indicator of the success of the rehabilitative process, the reverse was not true, that is to say, the absence of cooperation could not be taken as an unequivocal sign that the person concerned still had links to the criminal organisation. The

court also recognised that the choice to cooperate could be the result of a self-interested assessment aimed at taking advantage of statutory adjustments of sentence rather than a sign of successful rehabilitation.

Nevertheless, in the Constitutional Court's view, in the absence of a strict hierarchy among the aims of punishment laid down by the Constitution, the rules in force, although they resulted in significant impairment of the rehabilitative purpose of the sentence, did not restrict it in an unreasonable and disproportionate manner since they left open the possibility of following a rehabilitation programme.

40. In judgment no. 273 of 5 July 2001 the Constitutional Court again examined the constitutionality of section 4 *bis*. Referring to the explanatory report on the Act converting Decree-Law no. 306/1992, according to which convicted prisoners could only demonstrate conclusively that they had severed links with the criminal organisation by cooperating with the judicial authorities, the court considered that this choice by the legislature was consistent with the rehabilitative function of the sentence, as it constituted an unambiguous expression of the individual's intention to make amends for his or her criminal past. Accordingly, the Constitutional Court regarded a decision by a convicted prisoner not to cooperate with the authorities as "a statutory presumption" that he or she had maintained criminal links and had not sought to make amends.

41. Two years later, in judgment no. 135 of 24 April 2003, the Constitutional Court confirmed that the prohibition arising out of section 4 *bis* did not constitute an automatic statutory mechanism. It held that the law did not lay down any absolute prohibitions and merely made eligibility for conditional release dependent on "cooperation with the judicial authorities", which was the expression of a deliberate and free choice on the part of the prisoner. In the Constitutional Court's view, the provision in question did not act as an absolute, permanent bar to conditional release and was therefore not contrary to the principle of rehabilitation in Article 27 § 3 of the Constitution. Accordingly, the absence of cooperation was regarded by the legislature as a statutory presumption that the prisoner's rehabilitation had failed.

42. With regard to "irrebuttable statutory presumptions" liable to affect an individual's fundamental rights (judgments nos. 41/1999, 139/2010 and 265/2010), the Constitutional Court considered them to be contrary to the principle of equality if they were arbitrary and unreasonable or if they were not based on common practice in accordance with the maxim *id quod plerumque accidit* (judgment no. 57 of 29 March 2013). With more specific reference to adjustments of sentence, the Constitutional Court stressed the need for the courts to be empowered to assess the evidence in the specific case before them, so as to ensure that the granting of a particular adjustment had a reasonable prospect of assisting the prisoner in making progress towards rehabilitation (judgments nos. 436/1999, 255/2006 and 189/2010).

43. In its recent judgment no. 149 of 11 July 2018 (see also judgments no. 239 of 22 October 2014 and no. 76 of 12 April 2017), the Constitutional Court ruled on the constitutionality of section 58 *quarter* of the Prison Administration Act. That provision, which was found to be unconstitutional, stated that no adjustments of sentence could be granted to life prisoners convicted of the offence of abduction and false imprisonment resulting in the death of the victim, until the prisoner concerned had served twenty-six years in prison.

In that judgment the Constitutional Court emphasised the fact that laying down a minimum period of this kind ran counter to the principles of the progressive treatment of offenders and the flexibility of sentences, which formed the basis for the process of gradual rehabilitation. The court added that this minimum period erased the effects of “early release” (a reduction in sentence of forty-five days for each six months served), which had a negative impact on the prisoner’s motivation to complete the rehabilitative process. Lastly, referring to its previous rulings (judgments nos. 313/1990, 68/1995, 257/2006 and 78/2007), it criticised the automatic application to all prisoners of this minimum period of twenty-six years. It observed that this automatic statutory mechanism prevented the post-sentencing judge from making any assessment of the progress made by the prisoner throughout his or her time in prison, thereby giving precedence to the retributive aspect of the punishment to the detriment of its rehabilitative purpose. The court considered that “provisions imposing a blanket prohibition, for such an extended period, on sentence adjustments for certain categories of convicted prisoners – who [had] engaged in a meaningful way with the rehabilitation process and [did] not display any of the signs of danger to society identified by the legislature itself in section 4 *bis* – solely because of the seriousness of the criminal offence or the need to send a general preventive message to the population at large” were contrary to the constitutional principles of proportionality and individualised penalties (see also judgment no. 239 of 29 October 2014).

44. With regard to the presidential power of clemency provided for in Article 87 § 11 of the Constitution, the Constitutional Court, in judgment no. 200 of 18 May 2006, defined the nature of the decision to grant clemency and the scope of the powers of the head of State in that regard. It held that the presidential power of clemency served a purely humanitarian purpose and was designed to mitigate the rigid nature of the criminal law. It found in particular that since the enactment of Law no. 663 of 10 October 1986, presidential clemency, which was “designed solely to address extraordinary humanitarian situations” had resumed “its role of moderating or eliminating the criminal penalty”.

C. Case-law of the Court of Cassation

45. In judgment no. 45978 of 26 November 2012 the Court of Cassation ruled on an order made by the Sentence Supervision Court refusing a request for prison leave on account of the prisoner's lack of "cooperation with the judicial authorities". The Court of Cassation held that, in making provision for exemptions, for instance where such cooperation was "impossible" or "unenforceable", the legislation allowed the judge to conduct an individual personalised assessment of the prisoner's conduct, thereby ruling out rigid automatic mechanisms (see also judgments nos. 18206 of 30 April 2014, 34199 of 14 April 2016 and 9276 of 7 November 2017).

46. In judgment no. 47044 of 24 October 2017 the Court of Cassation reiterated its interpretation of the concepts of "impossible" and "unenforceable" cooperation (see also Constitutional Court judgments nos. 357/1994 and 68/1995). Thus, cooperation was deemed "impossible" where the information which the convicted prisoner might possess regarding the facts and the persons responsible had already been disclosed and elucidated; it was deemed "unenforceable" where the convicted prisoner, in view of his or her marginal role in the criminal organisation, did not have access to information on the facts and the persons responsible in the higher echelons of the organisation (see also, among many others, judgments nos. 3034 of 18 May 1995 and 29217 of 6 June 2013).

47. In judgment no. 46103 of 7 November 2014, the Court of Cassation held that "where membership of a criminal organisation is concerned, the fact that an individual is in prison does not necessarily mean that his or her involvement with the criminal organisation in question ceases automatically, given that periods of detention are accepted by the remaining members of the organisation as a foreseeable eventuality and that, through possible contacts in prison, involvement in the activities of the criminal group does not end completely". The court added that detention did not "put an end to [the prisoner's] availability to resume an active role" in the organisation on his or her release. In analysing the characteristics of the offence of membership of a mafia-type criminal organisation, and in particular its structural element and the legal interest protected, the Court of Cassation pointed out that this was a "permanent" offence (*reato permanente*) and that it presupposed the existence of a wide-ranging criminal design, projected into the future and without any limit in time. The offence of membership of a criminal organisation was thus to be distinguished from an offence in the context of which several individuals were involved in committing a particular "continuing offence" (*reato continuato*). As to the specific legal interest, the Court of Cassation held that it coincided with the need to protect public order from the potential threat posed by the very existence of the criminal agreement and by the

intention of those involved to commit criminal acts. On the basis of these premises the Court of Cassation concluded that the “permanent” nature of the offence dealt with in Article 416 *bis* was consistent with inactivity on the part of the member concerned or with the organisation being dormant, such that the organisational link ceased to exist only in the objective circumstance of termination of the agreement or the subjective circumstances of death, severance of the individual ties or exclusion by the other members of the organisation.

48. In its recent order no. 4474 of 20 December 2018 the Court of Cassation referred a question of constitutionality to the Constitutional Court concerning the disparity between section 4 *bis* and the rehabilitative function of sentences. In particular, it ruled as follows:

“Section 4 *bis*, subsection 1, of the Prison Administration Act is problematic in this context, as regards the granting of prison leave, because it imposes a blanket ban on eligibility [for prison leave] in respect of any person convicted of one of the offences referred to in the above-mentioned section who has not cooperated with the judicial authorities for the purposes of section 58 *ter* of the same Act.

...

After all, these resocialisation aims, which preclude the application of irrebuttable presumptions with regard to adjustments of sentence, have since found support in the case-law of the European Court of Human Rights, in the Grand Chamber judgment in *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts) ...

Nevertheless, the assertion that the termination of a prisoner’s links with the criminal group of which he or she was a member can only be demonstrated, while the sentence is being served, by cooperation within the meaning of section 58 *ter* cannot be said to be irrefutable, nor can it become an irrebuttable presumption that does not take account of the specific circumstances.

...

In view of the considerations set out above, the question of constitutionality concerning section 4 *bis*, subsection 1, of the [Prison Administration] Act must be declared relevant and not manifestly unfounded with regard to Articles 3 and 27 of the Constitution, in so far as [the provision in question] precludes eligibility for prison leave for life prisoners who have been convicted of offences committed by taking advantage of the conditions laid down by Article 416 *bis* of the Criminal Code or with the aim of facilitating the activities of the organisations referred to therein, and who have not cooperated with the judicial authorities for the purposes of section 58 *ter* of the Prison Administration Act.”

The Constitutional Court has not yet ruled on this matter.

D. Planned reforms of section 4 *bis*

49. The “Palazzo Commission”, which was tasked by a Ministry of Justice decree of 10 June 2013 with drafting proposals for reform of the criminal justice system, proposed, in particular, amending the provisions

governing life imprisonment in section 4 *bis* by replacing the irrebuttable presumption of dangerousness to society with a relative presumption. It thus suggested providing for other circumstances on the basis of which the outcome of the rehabilitation process and the absence of links to the criminal group could be assessed, in order to enable the prisoners in question to qualify for conditional release and the adjustments of sentence provided for by law.

50. On 19 May 2015 the government launched a “summit on the execution of sentences”, an initiative bringing together representatives from institutions, academia, and the various professions involved in the prison system, with the aim of drawing up plans to reform the system. The final paper, published on 19 April 2016, included a proposal to reform section 4 *bis* by introducing a new subsection designed to offer convicted prisoners an alternative to cooperation in order to qualify for adjustments of sentence and conditional release. The alternative consisted in restorative action with regard to the victims and the wider society.

51. Enabling Law no. 103 of 23 June 2017 (the so-called *legge Orlando*) empowered the government to reform the Criminal Code, the Code of Criminal Procedure and the Prison Administration Act. In particular, section 1(85)(e) delegated powers to the government to abolish the automatic mechanisms precluding individualised rehabilitative treatment in prison, and to reform the rules governing life prisoners’ eligibility for sentence adjustments, save in exceptionally serious and dangerous cases and, in any event, those concerning offences linked to mafia-type or terrorist activities. On 2 October 2018 the government enacted Legislative Decree no. 214 on the reform of the prison system, without amending the rules concerning the individualisation of treatment in prison and eligibility for sentence adjustments.

III. RELEVANT EUROPEAN AND INTERNATIONAL INSTRUMENTS

52. The European and international instruments of relevance to the present case, with particular reference to life sentences and the principle of rehabilitation, are set out in the judgments in *Vinter and Others v. the United Kingdom* ([GC], nos. 66069/09 and 2 others, §§ 60-75 and 76-81, ECHR 2013 (extracts)); *Dickson v. the United Kingdom* ([GC], no. 44362/04, §§ 28-36, ECHR 2007-V); and *Murray v. the Netherlands* ([GC], no. 10511/10, §§ 58-65 and 70-76, 26 April 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

53. Relying on Article 3 of the Convention, the applicant complained about the sentence of life imprisonment imposed on him, on the grounds that it was irreducible and afforded him no prospect of conditional release, in breach of the requirements of Article 3. Under Articles 3 and 8 of the Convention, he also alleged that the prison regime was incompatible with the aim of rehabilitation and resocialisation of prisoners.

54. The Court reiterates that it is master of the characterisation to be given in law to the facts of the case and is not bound by the characterisation given by an applicant (see, among other authorities, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, 17 September 2009; and *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018). Accordingly, in view of the manner in which the applicant's complaints are framed, the Court shall examine them solely under Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

1. Victim status

55. The Government maintained that the applicant could not be considered a victim within the meaning of Article 34 of the Convention, since no violation of his Convention rights could be attributed to the authorities.

56. In the Court's view, the Government's objection is closely linked to the question whether the sentence of life imprisonment imposed on the applicant is reducible *de jure* and *de facto*, and thus to the merits of the complaint of a violation of Article 3. It therefore decides to join it to the merits.

2. Failure to exhaust domestic remedies

57. The Government also raised an objection of failure to exhaust domestic remedies. In their view, the applicant was complaining in substance of not being found innocent by the domestic courts. They maintained that he had erroneously applied to the post-sentencing judge for conditional release, whereas a specific and appropriate remedy had been available to him by which to plead his innocence, in the form of a request to reopen the proceedings terminated by the final judgment in his case, under

Articles 629 et seq. of the Code of Criminal Procedure. Accordingly, the applicant was to be criticised for not making use of the remedy specifically provided for by that Code.

58. The applicant contested the Government's argument, stating that his assertions clearly related to his allegation that the national system did not afford any possibility of a remission of sentence for persons sentenced to life imprisonment for one of the offences referred to in section 4 *bis*. Hence, the sentence of life imprisonment was irreducible *de jure* and *de facto*, in clear breach of Article 3 of the Convention.

59. The applicant asserted that the purpose of his request to the post-sentencing judge had been to obtain a review of the penological grounds for his continued detention. However, in the absence of cooperation with the judicial authorities, the post-sentencing judge was not entitled to take into consideration the convicted prisoner's attempts at making amends and determine whether progress had been made.

60. As to his claim of innocence, the applicant stated that this was a personal feeling and conviction relating to his private sphere and was the expression of an aspect of his identity and his dignity as a human being. In his view, the fact that he protested his innocence should therefore be viewed solely as one of the factors preventing him from cooperating with the judicial authorities.

61. The applicant concluded that the only domestic remedy available to him in order to enable the national authorities to afford redress for the alleged violations was to apply to the post-sentencing judge for conditional release.

62. The Court observes at the outset that a request to reopen proceedings is an extraordinary remedy which can be exercised in respect of a final criminal conviction. It has previously found that applicants are not required to make use of this kind of extraordinary remedy for the purposes of the exhaustion rule under Article 35 § 1 of the Convention (see *Sofri and Others v. Italy* (dec.), no. 37235/97, ECHR 2003-VIII, and *Prystavska v. Ukraine* (dec.), no. 21287/02, ECHR 2002-X).

63. It also stresses that the situations in which a request to reopen the proceedings can be made are strictly defined as follows: a discrepancy between the facts as established in two final judgments convicting the defendant; the overturning (*revocazione*) of a civil or administrative judgment concerning a request for a preliminary ruling; the existence of new evidence justifying the person's acquittal; and a conviction handed down following the forging of official documents, judicial forgery (*falso in giudizio*) or another criminal offence.

64. The Court notes that the applicant's situation in the present case does not correspond to any of those outlined above. He complained, under Article 3 of the Convention, of his ineligibility for conditional release on account of the irreducible nature of the sentence of life imprisonment

imposed on him, and his claim to be innocent was just one of the circumstances on which he relied.

65. Accordingly, the Court considers that the applicant was correct in applying to the post-sentencing judge, as the authority responsible for ordering conditional release or any other form of adjustment of sentence for convicted persons, in order to request his release. In view of the foregoing considerations, the Court rejects the Government's objection.

3. Conclusion

66. In the light of the material available to it, the Court considers that the applicant's complaint under Article 3 raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. It also joins to the merits the Government's objection as to the applicant's "victim" status (see paragraph 56 above). The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

67. The applicant stated that there were two types of life imprisonment in the Italian system: an "ordinary" life sentence under Article 22 of the Criminal Code, which allowed for an adjustment of sentence after twenty-six years had been served; and an irreducible life sentence known as *ergastolo ostativo*, under section 4 *bis*. That provision entailed a prohibition on conditional release and sentence adjustments, based on an irrebuttable statutory presumption of dangerousness, namely the persistence of links between the convicted prisoner and the mafia-type criminal organisation to which he or she had belonged. That presumption could only be rebutted if the prisoner actually cooperated with the judicial authorities.

68. The applicant stated that owing to the existence of the aggravating circumstance taken into account in convicting him, based on his role as head of the mafia clan and instigator of its activities, the courts could not consider cooperation on his part to be "impossible" or "unenforceable" (see paragraph 46 above).

69. In the applicant's view, he had no prospect of being released or obtaining a review of his life sentence: irrespective of his behaviour in prison, his punishment remained immutable and incapable of being reviewed as the competent judge was not empowered to assess the results of his efforts to make amends.

70. The coercion to which he was subjected, besides running counter to his personal conviction that he was innocent and thus to his moral freedom, presented him with a dilemma: he could either accept the risk to his own life and the lives of his loved ones by laying them open to typical mafia-style reprisals, or he could refuse to cooperate and thus forego any prospect of release.

71. Cooperation with the judicial authorities could not be said to constitute a “prospect of release” on penological grounds for the purposes of Article 3 of the Convention. In that connection the applicant argued that the Italian system obliged convicted prisoners to cooperate with the judicial authorities, since refusal to do so excluded them from all rehabilitation programmes and thus from any prospect of being considered for conditional release. In the applicant’s view, the mechanism in question bore strong similarities to the system at issue in the case of *Trabelsi v. Belgium* (no. 140/10, §§ 134-39, ECHR 2014 (extracts)). Furthermore, the applicant argued that the automatic mechanism provided for by the Italian legislation gave undue weight to criminal-policy considerations, to the detriment of prisoners’ resocialisation needs; this was a violation of the human dignity of all prisoners. In his view, this mechanism reduced him to nothing more than the crime he had committed and meant that his release from prison was only possible if he adopted an instrumental approach (consisting, in his case, of offering wholesale cooperation); at the same time, it disregarded any efforts on his part to rehabilitate.

72. Lastly, with regard to the aims of rehabilitation and reintegration of prisoners derived from the principles established by the Court (the applicant referred to *Murray*, cited above, §§ 102-04, and *Khoroshenko v. Russia* [GC], no. 41418/04, § 121, ECHR 2015), he alleged that the mechanism in question implied an irrebuttable presumption of non-rehabilitation and continuing dangerousness in the absence of cooperation. The possibility of working towards rehabilitation thus became meaningless for him and this prospect, in addition to causing him acute distress, deprived him of any opportunity to influence his reintegration into society through his behaviour. His capacity for self-determination was also affected. In the applicant’s view, the Italian State had not complied with its positive obligation to afford him the possibility of working towards rehabilitation.

73. As to the procedure for conditional release, the applicant submitted that his conduct had been positive throughout his detention, both in terms of his behaviour and in rehabilitative terms, and that he had taken part successfully in rehabilitation activities. As no disciplinary sanctions had ever been imposed on him, he had accumulated more than five years of “early release” credit (as of 30 December 2013) on account of his participation in the activities offered by the prison management. However, he could not take advantage of this credit because he was detained under the section 4 *bis* prison regime.

The applicant added that the progress he had made in prison had been noted by the L'Aquila Sentence Supervision Court in its order ending the application of the "section 41 *bis* regime" in his case. However, even if he adduced concrete evidence in support of his application for release it would be impossible for him to have it examined, either under the procedure for conditional release or under the procedure for requesting prison leave. Accordingly, the applicant alleged that the review procedure did not satisfy the procedural requirements laid down by the Court's case-law on the subject (the applicant referred to *Murray*, cited above, § 99).

74. Lastly, with regard to the presidential power of clemency, the applicant asserted that no prisoner sentenced to life imprisonment under section 4 *bis* had ever been pardoned by the President of the Republic.

(b) The Government

75. The Government began by pointing to the specific context in which section 4 *bis* was applied. Owing to the extremely serious nature of the offences concerned, in which the mafia element was characterised by the strength of the links and their stability over time, the regime in question required the prisoner to demonstrate in a tangible manner, through cooperation with the authorities, that he or she had made progress towards rehabilitation in prison and had "dissociated" himself or herself from the criminal world. In other words, in the Government's submission, the prisoner in question had to be able to prove, on completion of the process of resocialisation, that he or she had rejected "criminal values" by contributing to the "dismantling" of the mafia organisation and to restoring lawfulness.

76. The Government added that there was a major difference between the 41 *bis* regime and the regime provided for in section 4 *bis*. In the present case, the post-sentencing judge had ended the application of the special prison regime under section 41 *bis* on the grounds that the applicant no longer had the capacity to maintain his contacts with the criminal organisation from prison; under section 4 *bis*, meanwhile, prisoners had to provide positive evidence that they had broken off all links to the criminal organisation to which they had belonged.

77. In the Government's view, this was a fundamental distinction, especially since the mafia clan in question, of which the applicant was acknowledged to have been a past leader, was still very active in Taurianova, as demonstrated by the pre-trial detention orders made against members of the clan and the arrest of the applicant's wife on 12 December 2017.

78. As to the nature of the life sentences governed by section 4 *bis*, the Government, pointing to the case-law of the Italian Constitutional Court and Court of Cassation, maintained that these sentences were *de jure* and *de facto* reducible.

79. According to the Government, persons serving life sentences could make an application to the post-sentencing judge for conditional release on the basis of the results of the rehabilitation programme and their cooperation with the judicial authorities. The system also offered persons serving life sentences practical prospects, by allowing them to be considered for sentence adjustments if cooperation was “impossible” or “unenforceable” (the Government furnished a very detailed list of previous judicial decisions concerning this aspect), and by linking eligibility for such adjustments to the free choice of the individual concerned to cooperate rather than to an automatic statutory mechanism. The legislature regarded such cooperation as an objective indicator of the rejection of “criminal values” and of “dissociation” from the mafia group; that was why it had opted to give precedence to the requirements of general prevention and the protection of society.

80. The Government submitted that in the present case the review procedure had made it possible to take into account the applicant’s progress towards rehabilitation. The courts had been able to determine whether the applicant had made progress such that his continued detention could no longer be justified on legitimate penological grounds. Furthermore, the applicant had and continued to have the possibility of cooperating with the judicial authorities in order to furnish irrefutable evidence of his complete rehabilitation.

81. In addition, the domestic system provided for two alternative remedies to an application for conditional release: a request for presidential clemency under Article 174 of the Criminal Code, and an application for a stay of execution of the sentence on health grounds under Articles 147 and 148 of the same Code.

82. As to the prospects for release on penological grounds, the Government disputed the applicant’s reading of the *Trabelsi* judgment (cited above), which related primarily to the lack of objective, pre-established criteria in the review procedure in the United States. In the Government’s submission the Italian legislation, by contrast, provided for a procedure for reviewing life sentences based on clear and objective criteria. The effects of cooperation with the judicial authorities were also clearly set out in Article 58 *ter* of the Criminal Code and were known in advance to convicted prisoners.

83. The Italian system guaranteed prisoners serving life sentences an opportunity to work towards rehabilitation, in accordance with the positive obligation arising under Articles 3 and 8 of the Convention. The goal of reintegration was pursued by the Prison Administration Act, even for prisoners serving life sentences under the *ergastolo ostativo* regime, through the individualised treatment of prisoners (lasting support for prisoners’ cultural, human and professional interests, removal of obstacles to personal development, and action to promote socialisation).

84. By way of conclusion, the Government submitted that the legislature had simply added a subsequent condition for prisoners serving life sentences under section 4 *bis*. Once the prisoners concerned had fulfilled that condition – which they were free to do by cooperating with the authorities – they could aspire to conditional release and adjustments of sentence. Thus, in the Government’s view, the Italian system was compatible with Article 3 of the Convention.

(c) The third-party interveners

(i) The academics and experts coordinated by the University of Milan (Department of International, Legal, Historical and Political Studies)

85. The academics and experts coordinated by the University of Milan began by tracing the legislative developments in this sphere. Section 4 *bis* had originally been designed to allow prisoners who had cooperated with the judicial authorities preferential access to adjustments of sentence compared with other prisoners, that is, before the usual period had elapsed. That provision had been amended by Decree-Law no. 306 of 8 June 1992 following the attack on Judge G. Falcone and his police escort; as a result of the amendment, “cooperation” became a prerequisite in order to qualify for conditional release and adjustments of sentence.

86. The third party also referred to the Court’s case-law, inferring from it that, while no treatment or punishment must ever be contrary to the principle of “human dignity” regardless of its deterrent effect, making no provision for prisoners “not to cooperate” and to remain silent was an infringement of individual dignity and the individual’s right to self-determination. According to the third-party intervener, the automatic legislative mechanism whereby prisoners who did not cooperate were not entitled to any adjustment of sentence established an irrebuttable presumption of dangerousness linked to a broad, heterogeneous category of offences designated by the legal literature as “offender-based criminal law” (*diritto penale d’autore*). In practice, no court could reverse the presumption that the offender posed a danger to society.

87. In the view of this third party, the system of whole-life sentences was also contrary to the principles of individualised and progressive treatment of prisoners: *ergastolo ostativo* prevented prisoners who did not cooperate from making any progress towards gradual reintegration into society.

(ii) L’altro diritto onlus documentation centre (University of Florence)

88. The *L’altro diritto onlus* documentation centre began by stating that, according to the statistics furnished in 2016 by the Italian Ministry of Justice, 72.5% of life prisoners (that is, 1,216 individuals) were being detained for one of the offences referred to in section 4 *bis* (*ergastolo*

ostativo). According to the third-party intervener, in making “cooperation with the judicial authorities” a prerequisite for any assessment of a convicted prisoner’s progress towards rehabilitation, the national system was incompatible with prisoners’ right to self-determination. The prisoners in question were unable to determine the course of their own lives in prison or to have any influence over the course taken by their sentence, since their behaviour and actions were not taken into account by the judge if they had not cooperated. Furthermore, life sentences of this type were in breach of States’ positive obligation to organise their prison system in such a way as to promote the rehabilitation and reintegration of prisoners.

89. Lastly, the third-party intervener submitted that the decision whether or not to cooperate forced prisoners serving life sentences to choose between their dignity (their ability to influence the process for their release, which was dependent on cooperation), on the one hand, and their own life and the lives of their loved ones (given the risk of reprisals from mafia circles) on the other. On the latter point in particular they submitted, on the basis of first-hand observation of the life prisoners they had been in contact with, that the main reason why prisoners refused to cooperate was their fear of endangering their own life or the lives of their loved ones.

(iii) *European Prison Litigation Network (EPLN)*

90. In the EPLN’s submission, the criterion of “non-cooperation” could not be regarded as a legitimate penological ground; in any event, the review procedure in Italy did not satisfy the Convention requirements. In particular, the domestic case-law showed that the post-sentencing judge was obliged to carry out a virtually binary assessment (cooperation or no cooperation) that was far removed from a review *in concreto* of the penological grounds justifying continued detention.

91. The EPLN called on the Court to address two issues and thus clarify its case-law: the first concerning the establishment of a requirement for rigorous judicial review, attended by procedural safeguards comparable to those that existed with regard to personal freedom; and the second relating to the establishment of a genuine “right to social reintegration” dictated by the principles of effectiveness (enabling the Court to clarify States’ obligations) and subsidiarity (resulting in the national courts assessing compliance with the Convention at domestic level).

2. *The Court’s assessment*

(a) **Applicable principles**

92. The relevant principles as regards life sentences, rehabilitation and conditional release are set out in detail in the judgment in *Vinter and Others* (cited above, §§ 103-22, with references to *Kafkaris v. Cyprus* [GC], no. 21906/04, ECHR 2008), and were summarised recently in the judgments

in *Murray* (cited above, §§ 99-100) and *Hutchinson v. the United Kingdom* ([GC], no. 57592/08, §§ 42-45, 17 January 2017).

(b) Application of those principles to the present case

93. The Court observes at the outset that the applicant in the present case did not seek to argue that his sentence of life imprisonment was grossly disproportionate (see, among other authorities, *Matiošaitis and Others v. Lithuania*, nos. 22662/13 and 7 others, § 157, 23 May 2017, and *Vinter and Others*, cited above, § 102), but complained of the alleged *de jure* and *de facto* irreducibility of the sentence.

94. The Court further notes that the present case is to be distinguished from previous cases brought against Italy concerning life sentences, in which the Court was called upon to examine the issue of life sentences governed by Article 22 of the Criminal Code. In its decision in *Garagin v. Italy* ((dec.), no. 33290/07, 29 April 2008; see also *Scoppola v. Italy* (dec.), no. 10249/03, 8 September 2005), it held that life imprisonment remained compatible with Article 3 of the Convention, finding as follows:

“... life prisoners may be released [as confirmed by the wording of] Article 176 of the Criminal Code. Under that provision life prisoners whose behaviour demonstrates a genuine desire to repent may be released after serving twenty-six years’ imprisonment. They are also eligible for the semi-custodial regime after serving twenty years in prison (section 50(5) of Law no. 354 of 1975 ...) ... in Italy, life sentences are ... reducible *de jure* and *de facto*. Accordingly, it cannot be said that the applicant has no prospect of release or that his continued detention, even for a lengthy period, in itself amounts to inhuman or degrading treatment.”

Furthermore, in *Vinter and Others* (cited above, § 117), the Court referred, among other authorities, to Italian domestic law – both the legislation and the case-law of the Constitutional Court – in finding that the practice in the Contracting States demonstrated a commitment to both the rehabilitation of life sentence prisoners and the prospect of their eventual release.

95. The Court observes that in the present case the regime applicable to life imprisonment results from the combined application of Article 22 of the Criminal Code and sections 4 *bis* and 58 *ter* of the Prison Administration Act. This specific category of life sentence is characterised in domestic law as *ergastolo ostativo*.

96. It notes that the provisions in question provide for different treatment of prisoners who have not satisfied the requirement to cooperate with the judicial authorities, precluding them from eligibility for conditional release, other reductions of sentence and alternatives to detention (other than “early release”). Although the legislature laid down certain criteria governing eligibility for all measures assisting the gradual rehabilitation of life prisoners under Article 22 of the Criminal Code (good behaviour, participation in the rehabilitation programme, progress during the treatment

programme, positive evidence of a desire to make amends), depending on the measure being applied for, it introduced a specific condition in section 4 *bis* (see paragraph 32 above) preventing the domestic courts from granting adjustments of sentence.

97. The Court notes that the form which this cooperation must take is governed by section 58 *ter* (see paragraph 33 above): the convicted prisoner must provide the authorities with information that is decisive in terms of preventing any further consequences of the offence or assisting in the establishment of the facts and the identification of the perpetrators of criminal offences. The prisoner is relieved of this obligation if such cooperation can be characterised as “impossible” or “unenforceable” (see paragraph 46 above) and if he or she can prove the severing of all current links with the mafia group (see paragraph 32 above).

(i) *Prospect of release and possibility of applying for conditional release*

98. The Court observes, like the applicant and the Government (see paragraphs 68 and 77 above) that, owing to the existence of the aggravating circumstance taken into account in the applicant’s case, based on his role as head of the mafia group to which he belonged, cooperation on his part could not be characterised as “impossible” or “unenforceable” for the purposes of the legislation in force and the Court of Cassation’s case-law (see paragraphs 33 and 46 above).

99. Hence, in order to determine in the present case whether a life sentence classified as *ergastolo ostativo* is reducible *de jure* and *de facto*, that is, whether it affords a prospect of release and a possibility of review (see, among many other authorities, *Hutchinson*, cited above, § 42), the Court will concentrate on the only option available to the applicant, namely to cooperate in the context of the judicial authorities’ investigative and prosecution activities (see paragraph 77 above), in order to be able to apply for and be granted release.

100. The Court notes that the situation in issue in the present case appears to differ from the facts underlying the case of *Öcalan v. Turkey* (no. 2) (nos. 24069/03 and 3 others, §§ 200-02, 18 March 2014). In that case, the incompatibility between the Turkish legal system and Article 3 of the Convention stemmed from the legislation in force at the time, which prohibited the applicant, in his capacity as a person sentenced to aggravated life imprisonment for a crime against the security of the State, from applying for release on legitimate penological grounds at any time while serving his sentence. This was an automatic consequence of the legislation in question, which ruled out any possibility of obtaining a review of the sentence and was linked to the nature of the criminal offence of which the applicant was accused.

101. The Court observes that in the present case the domestic legislation does not prohibit access to conditional release and to other adjustments of

prison sentences in absolute terms and with automatic effect, but makes such access contingent on “cooperation with the judicial authorities”.

102. The applicant’s situation, stemming from section 4 *bis*, therefore lies somewhere between that of a prisoner serving an ordinary life sentence under Article 22 of the Criminal Code, whose sentence is reducible *de jure* and *de facto*, and that of a prisoner who is barred by the system, owing to a legal or practical obstacle, from any possibility of release, in breach of Article 3 of the Convention.

103. The Court takes note of the Government’s assertion (see paragraph 75 above) that the aim of section 4 *bis* is to require convicted prisoners to demonstrate in a tangible manner that they have “dissociated” themselves from the criminal world and have made progress towards rehabilitation, through meaningful cooperation with the judicial authorities aimed at “dismantling” the mafia organisation and restoring lawfulness (see also the case-law of the Constitutional Court cited at paragraph 40 above). In the Government’s view, the criminal-policy objective underpinning section 4 *bis* is thus clearly defined, as emphasised moreover in Constitutional Court judgment no. 306/1993 (see paragraph 39 above): the legislature gave express precedence to the goals of general prevention and protection of the community, by requiring persons convicted of the offences in question to demonstrate that they had cooperated with the authorities, such cooperation being considered an essential tool in tackling mafia-type activities. According to the Government, the specific nature of these activities justifies a life-imprisonment regime that differs from the ordinary regime under Article 22 of the Criminal Code.

104. With regard to the phenomenon of mafia-type activities, the Court considers it relevant to refer to the Government’s observations (see paragraph 75 above) and to the judgment of the Palmi Assize Court (see paragraph 9 above) noting the specific nature of mafia-type criminal organisations and of the pact binding their members, which is of a particularly solid and lasting nature.

105. The Court also refers to Court of Cassation judgment no. 46103 of 7 November 2014 (see paragraph 47 above), in which that court observed that the offence of membership of a mafia-type criminal organisation, a “permanent” offence (*reato permanente*), presupposed the existence of a wide-ranging criminal design, projected into the future and without any limit in time. According to the Court of Cassation, the fact that a member of a mafia-type organisation was incarcerated did not imply the automatic cessation of his or her involvement with the organisation. The Court of Cassation inferred from this that the “permanent” nature of the offence dealt with in Article 416 *bis* was consistent with inactivity on the part of the member concerned or with the organisation being dormant, such that the organisational link ceased to exist only in the objective circumstance of termination of the agreement or the subjective circumstances of death,

severance of the individual ties or exclusion by the other members of the organisation (see paragraph 47 above).

106. Section 4 *bis* therefore entails a presumption that the convicted prisoner poses a threat linked to the type of offence of which he or she is accused. According to this presumption, the danger posed and the links to the criminal environment do not cease solely as a result of incarceration. The Court notes the Government's assertion that it is for this reason that the provision in question requires the prisoners concerned to furnish concrete evidence, by cooperating with the authorities, that they have severed links to their criminal environment, a circumstance which, in the Government's view, is also an indicator of successful rehabilitation.

107. The Court reiterates that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention (see *Vinter and Others*, cited above, § 104).

108. It has also held that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, including in the case of life prisoners (*ibid.*, §§ 115-18), particularly towards the end of a long prison sentence (see *Dickson*, cited above, § 75, with its reference to paragraphs 28-36 of the same judgment). The principle of reintegration into society is reflected in international norms and is now recognised in the Court's case-law (see *Murray*, cited above, § 102, and the case-law cited therein).

109. At the domestic level the Court notes that, since Constitutional Court judgment no. 313 of 1990 (see paragraph 38 above), that court's case-law on the purpose of punishment reflects the central role of resocialisation, which must accompany the sentence from its formulation as an abstract rule until its completion in practice. The Constitutional Court ruled that this principle must guide the actions of the legislature, the ordinary courts, the post-sentencing courts and the prison authorities.

110. On the basis of these preliminary considerations, the Court will address the central issue that arises in the applicant's case, namely whether the balance to be struck between the aims of criminal policy and the rehabilitative function of sentences does not result, in practice, in unduly restricting individuals' prospects of release and the possibility for them to obtain a review of their sentence.

111. The Court observes that the Italian prison system is based on the principle of progressive treatment of prisoners (*progressione trattamentale*), according to which active participation in an individual rehabilitation programme and the passage of time may have a positive effect on convicted prisoners and foster their full reintegration into society. As convicted persons progress while in prison (assuming that this occurs), the system affords them the opportunity to apply for a range of progressive measures

(from outside work to conditional release) intended to accompany them on the “road to release”.

112. This is a variant of the rehabilitation function of incarceration referred to in *Murray* (cited above, § 101).

113. The Court also reiterates that it would be incompatible with human dignity 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. It has specified that “[a] whole life prisoner is entitled to know ... what he must do to be considered for release and under what conditions” (see *Vinter and Others*, cited above, § 122).

It has also held that the authorities must give life prisoners a real opportunity to rehabilitate themselves (see *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, § 264, ECHR 2014 (extracts)). This is clearly a positive obligation of means, not of result, entailing a requirement to secure prison regimes to life prisoners that are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation (see *Murray*, cited above, § 104). In this context the Court has previously found that this obligation was not fulfilled in situations where it was the prison regime or the conditions of detention which obstructed rehabilitation (see *Harakchiev and Tolumov*, cited above, § 266).

114. The Court takes note of the position adopted in the present case by the Government, who argued that the obstruction stemming from the absence of “cooperation with the judicial authorities” was not the result of an automatic legislative mechanism depriving the applicant in absolute fashion of any prospect of release, but instead was the consequence of a personal choice. The central role assigned to the free will of the prisoner, who, in the Government’s submission, is solely responsible for his or her own destiny, constitutes one of the main arguments adduced by the Government (see paragraph 79 above), who also rely on the case-law of the Constitutional Court (see paragraph 41 above).

115. The Court also takes note of the applicant’s argument that cooperation with the authorities would place him and his loved ones at risk of reprisals by the mafia organisation and would run counter to his personal conviction that he is innocent (see paragraph 70 above). The applicant also criticises the instrumental approach of the system, which, in his submission, makes his release conditional on wholesale cooperation on his part (see paragraph 71 above).

116. While it is true that the domestic system gives convicted prisoners a choice as to whether or not to cooperate with the judicial authorities, the Court has doubts as to the free nature of that choice and the appropriateness of equating a lack of cooperation with the prisoner’s dangerousness to society.

117. Without wishing to express a view on the merits of the applicant's protestation of innocence – a matter which, moreover, it is not competent to determine – the Court notes that the applicant simply asserted that he had decided not to cooperate with the judicial authorities in order not to go against his own private conviction and to be spared a violent reaction from his former associates (see paragraph 70 above). In this connection, reference should be made to the submissions of the third-party intervener *L'altro diritto onlus* concerning its first-hand observation of prisoners serving life sentences under the section 4 *bis* regime. According to the third-party intervener, the main reason why prisoners convicted of mafia-type offences refuse to cooperate with the judicial authorities is their fear for their own lives and the lives of their loved ones (see paragraph 89 above).

118. The Court infers from this that failure to cooperate is not always the result of a free and deliberate choice, nor does it necessarily reflect continuing adherence to “criminal values” or ongoing links with the criminal organisation in question. Indeed, this was acknowledged by the Constitutional Court in judgment no. 306 of 11 June 1993, in which it held that the absence of cooperation did not necessarily indicate that the person still had links to the mafia organisation (see paragraph 39 above).

119. The Court also notes, as did the Constitutional Court in the same judgment, that a situation could reasonably be imagined in which a convicted prisoner might cooperate with the authorities not as a result of any rehabilitation on his or her part or a genuine severing of contact with criminal circles, but solely in order to take advantage of the adjustments of sentence provided for by law.

120. It notes that, if other circumstances or other considerations may prompt a convicted prisoner to refuse to cooperate, or if cooperation may be offered for purely opportunistic reasons, the fact that the absence of cooperation is directly equated with an irrebuttable presumption of dangerousness to society ultimately fails to reflect any actual progress made by the applicant towards rehabilitation.

121. The Court observes, indeed, that the fact of regarding cooperation with the authorities as the only possible demonstration of the convicted prisoner's “dissociation” and rehabilitation fails to take account of other indicators that could be used to assess a prisoner's progress. It cannot be ruled out that the severing of ties with mafia circles may be expressed in ways other than cooperation with the judicial authorities.

122. As the Court observed earlier (see paragraph 111 above), the Italian prison system offers a range of progressive opportunities for contact with society – from work outside prison, through prison leave and the semi-custodial regime, to conditional release – designed to ease the prisoner's reintegration into society. The applicant was not afforded these opportunities for progressive reintegration.

123. The Court notes that this was the case despite the fact that the reports on the applicant's behaviour in prison submitted in support of his application for conditional release (see paragraph 24 above) observed a positive change in his personality. Likewise, it notes that – although it was issued in a different legal context – the order made by the L'Aquila Sentence Supervision Court ending the “section 41 *bis*” regime in the applicant's case stated that he had made progress towards rehabilitation (see paragraph 16 above).

124. Furthermore, the Court notes the applicant's assertion that he had never had disciplinary sanctions imposed on him and that since being convicted he had built up entitlement to be released approximately five years early on account of his participation in the rehabilitation programme (see paragraph 73 above), but that he could not take advantage of the reduction of sentence in practice because of the absence of cooperation on his part.

125. In the Court's view, a convicted prisoner's personality does not remain unchanged from the time of commission of the offence. It may evolve in the course of his or her sentence, in accordance with the principle of rehabilitation, which enables individuals to reflect in a critical manner on their criminal past and rebuild their personality (see *Murray*, cited above, § 102).

126. The Court reiterates that prisoners are therefore entitled to know what they must do to be considered for release and under what conditions (see *Vinter and Others*, cited above, § 122, and *Trabelsi*, cited above, §§ 115 and 137).

127. In the instant case the Court considers that the absence of “cooperation with the judicial authorities” gives rise to an irrebuttable presumption of dangerousness which has effectively deprived the applicant of any realistic prospect of release (see, among other authorities, *Harakchiev and Tolumov*, cited above, § 264, and *Matiošaitis and Others*, cited above, § 177). There is a risk that he will never be able to atone for his offence: whatever he does in prison, his punishment remains fixed and unreviewable and, if anything, will become greater with time (see *Vinter and Others*, cited above, § 112).

128. The Court observes that it is impossible for the applicant to demonstrate that his continued imprisonment is no longer justified on legitimate penological grounds and thus contrary to Article 3 of the Convention (*ibid.*, § 129), since by continuing to equate the absence of cooperation with the irrebuttable presumption of dangerousness to society (see paragraphs 116 and 120 above), the rules in force effectively assess the person's dangerousness by reference to the time when the offence was committed, instead of taking account of the rehabilitation process and any progress the prisoner may have made since being convicted.

129. Furthermore, the Court stresses that this irrebuttable presumption effectively prevents the competent court from examining the application for conditional release and from ascertaining whether, in the course of his sentence, the applicant has changed and made progress towards rehabilitation to the extent that detention is no longer justified on penological grounds (see *Murray*, cited above, § 100, with the case-law cited therein). The court's involvement is limited to finding that the requirement to cooperate has not been satisfied; it is not empowered to assess the prisoner's individual history and progress towards rehabilitation. This is true of the assessment carried out by the L'Aquila Sentence Supervision Court in the present case. The court rejected the applicant's application for conditional release after noting that he had not cooperated with the judicial authorities (see paragraph 25 above), without assessing the progress which the applicant claimed to have made since his conviction.

130. The Court acknowledges the fact that the offences of which the applicant was convicted concern a phenomenon which poses a particular threat to society. It notes, too, that the introduction of section 4 *bis* arose out of the 1992 prison reform, carried out against the backdrop of an emergency in which the legislature was called upon to act following an episode which had marked Italy profoundly (see paragraph 85 above), in a particularly critical situation. However, efforts to tackle that scourge cannot justify derogating from the provisions of Article 3 of the Convention, which prohibit in absolute terms inhuman or degrading punishment. The nature of the offences with which the applicant was charged is therefore irrelevant to the assessment of the present application under Article 3 (see *Öcalan*, cited above, §§ 98 and 205, with the case-law cited therein). The Court has also previously held that the ultimate aim of rehabilitation is to prevent reoffending and ensure the protection of society (see *Murray*, cited above, § 102).

131. It should be pointed out that the Court, in a case relating to the length of pre-trial detention and thus to Article 5 of the Convention, reiterated the principle whereby "a statutory presumption of dangerousness, may be justified, particularly where it is not absolute but may be rebutted by proof to the contrary" (see *Pantano v. Italy*, no. 60851/00, § 69, 6 November 2003). This assertion is even more valid in the context of Article 3 of the Convention given the absolute nature of that provision, which brooks no exception (see, among many other authorities, *Trabelsi*, cited above, § 118).

132. Moreover, the Court observes that there appears to be a recent trend at domestic level towards questioning the irrebuttable presumption of dangerousness to society, as demonstrated by Constitutional Court judgment no. 149 of 11 July 2018 (see paragraph 43 above), the Court of Cassation's referral to the Constitutional Court of a question concerning the constitutionality of section 4 *bis* (see paragraph 48 above), and two recent

government proposals for reform of that provision (see paragraphs 49 and 50 above).

(ii) *Other domestic remedies by which to obtain a review of sentence*

133. Lastly, as regards the Government's assertion that the domestic system provides for two other remedies by which to obtain a review of sentence, namely a request for presidential clemency and an application for a stay of execution of the sentence on health grounds (see paragraph 81 above), the Court points to its relevant case-law, according to which the possibility for a prisoner serving a life sentence to be granted clemency 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 used since *Kafkaris* (see *Vinter and Others*, cited above, § 127; see also *Öcalan*, cited above, § 203, and *László Magyar v. Hungary*, no. 73593/10, §§ 57 and 58, 20 May 2014).

134. In particular, the Court observes that the Constitutional Court, in judgment no. 200 of 18 May 2006 (see paragraph 44 above), held that the presidential power of clemency had a purely humanitarian purpose and was designed to mitigate the rigid nature of the criminal law. As to applications for a stay of execution of sentence on health grounds, this corresponds to what the Court has defined as a "review limited to compassionate grounds" (see *Hutchinson*, § 43; *Vinter and Others*, § 127; and *Matiošaitis and Others*, § 173, all cited above).

135. The Court also takes note of the applicant's assertion that no prisoner sentenced to life imprisonment under section 4 *bis* has ever been granted presidential clemency (see paragraph 74 above). In that connection the Government have not provided any examples of convicted offenders sentenced to this type of life imprisonment who have obtained an adjustment of their sentence by means of presidential clemency (see *Bodein v. France*, no. 40014/10, § 59, 13 November 2014, and, conversely, *Kafkaris*, cited above, § 103).

(iii) *Conclusion*

136. The Court reiterates that it would be incompatible with human dignity – which lies 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 someday regain that freedom (see *Vinter and Others*, cited above, § 113).

137. In view of the above-mentioned principles, and for the reasons advanced above, the Court considers that the sentence of life imprisonment (*ergastolo ostativo*) being served by the applicant under section 4 *bis* of the Prison Administration Act restricts to an excessive degree his prospect of release and the possibility for him to obtain a review of his sentence.

Accordingly, this life sentence cannot be described as reducible for the purposes of Article 3 of the Convention. The Court thus rejects the Government's objection as to the applicant's victim status and holds that the requirements of Article 3 of the Convention have not been complied with in this regard.

138. Nevertheless, the Court considers that the finding of a violation in the present case cannot be understood as giving the applicant the prospect of imminent release (see, among other authorities, *Harakchiev and Tolumov*, cited above, § 268, and *László Magyar*, cited above, § 59).

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

139. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

...”

140. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction but also to choose, subject to supervision by the Committee of Ministers, the general and/or individual measures that should be taken to put an end to the violation found by the Court and to redress the effects (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *László Magyar*, cited above, § 70). Exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-94 and its operative provisions, ECHR 2004-V; *Scoppola*, cited above, § 148; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 255, ECHR 2012).

141. The present case highlights a structural problem which has resulted in a number of applications currently pending before the Court. Looking to the future, it could give rise to numerous further applications concerning the same issue.

142. The Court reiterates that the irrebuttable presumption that persons serving a sentence of life imprisonment for offences dealt with in section 4 *bis* of the Prison Administration Act pose a danger if they have not cooperated with the judicial authorities is liable to deprive persons convicted of those offences of any prospect of release and any possibility of obtaining a review of their sentence.

143. The nature of the violation found under Article 3 of the Convention indicates that the State should undertake, preferably through legislation, a reform of the rules governing life imprisonment so as to make it possible to have the sentence reviewed. This would enable the authorities to assess whether, while serving his or her sentence, the prisoner has changed and made progress towards rehabilitation to such an extent that his or her continued detention can no longer be justified on legitimate penological grounds. Prisoners would thus also be entitled to know what they must do to be considered for release and under what conditions. While the Court acknowledges that the State is entitled to require such prisoners to demonstrate that they have severed links with mafia circles, it is of the view that this may be expressed in ways other than through cooperation with the judicial authorities and the automatic mechanism under the legislation currently in force.

144. The Contracting States enjoy a wide margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. A life sentence does not become irreducible by the mere fact that in practice it may be served in full (see *László Magyar*, cited above, § 72). Accordingly, the possibility of review of a life sentence implies the possibility for the convicted person to apply for release but not necessarily to be released if he or she continued to pose a danger to society.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. 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

146. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

147. The Government contested the claim, submitting that the alleged damage stemmed from the fact that the applicant had not yet completed the process of rehabilitation and that, in the absence of positive evidence that he had severed all links with the mafia organisation – which was a deliberate choice on his part – he continued to pose a threat to public safety. They added that the alleged suffering associated with the applicant’s situation as a life prisoner was not substantiated by any medical documents justifying the amount claimed. Lastly, in the alternative, the Government requested the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction.

148. The Court considers in the circumstances of the present case that its finding of a violation of Article 3 of the Convention constitutes sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant (see, among many other authorities, *Matiošaitis and Others*, cited above, § 199). Accordingly, it makes no award under that head.

B. Costs and expenses

149. The applicant also claimed EUR 17,600, plus any tax that might be payable, in respect of the costs and expenses incurred before the domestic courts in the proceedings seeking conditional release, and EUR 42,500, plus any tax that might be payable, for the proceedings before the Court. He requested that any amounts awarded under this head be paid directly to his lawyers, who had not yet been paid the sums in question.

150. The Government contested the applicant's claims, submitting that they were abstract, unsubstantiated by any relevant documentation and unrelated to the domestic fee scales, especially since the applicant had engaged the services of three lawyers. They also alleged that the claim for reimbursement in respect of the *pro veritate* opinion written by one of the applicant's lawyers in the domestic proceedings was unjustified on ethical grounds. Lastly, they observed that the invoices produced by the applicant showed that he not yet incurred the expenses claimed for the work of his lawyers.

151. 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 were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the applicant the sum of EUR 6,000, covering costs under all heads, to be paid into the bank accounts nominated by his representatives.

C. Default interest

152. 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. *Joins* to the merits and *rejects*, unanimously, the Government's preliminary objection as to the applicant's "victim" status;
2. *Declares*, unanimously, the application admissible;

3. *Holds*, by six votes to one, that there has been a violation of Article 3 of the Convention;
4. *Holds*, by six votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, in the manner set out in paragraph 151 of the present judgment, and within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 13 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court. {signature_p_2}

Renata Degener
Deputy Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

L.-A.S.
R.D.

DISSENTING OPINION OF JUDGE WOJTYCZEK

(Translation)

1. To my great regret I am unable to subscribe to the majority's view that the Italian Republic has violated Article 3 of the European Convention on Human Rights in the present case.

2. Article 2 of the Convention imposes on the High Contracting Parties an obligation to take appropriate steps to safeguard human life. Thus, in the case of *Kayak v. Turkey* (no. 60444/08, § 53, 10 July 2012), for example, the Court reiterated as follows:

“... that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports* 1998-III), and that this involves a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Makaratzis v. Greece* [GC], no. 50385/99, § 57, ECHR 2004-XI).”

This obligation concerns, in particular, protection against organised crime. The High Contracting Parties have a duty to take effective measures to dismantle criminal organisations which pose a threat to people's lives. To achieve that, it is vital to destroy the ties of solidarity between the members of such organisations and the code of silence that surrounds them. To that end, the national authorities must take the measures that are appropriate in view of the specific circumstances in their country.

3. The key elements of the present case can be summarised as follows. The applicant, who was sentenced to life imprisonment, was the head of a criminal organisation, one which continues to pose a threat to the lives and safety of persons in Italy. The applicant possesses information that could help the authorities to prosecute other individuals actively involved in that organisation and thus help to significantly reduce the threat to lives and prevent further crimes. However, he refuses to disclose the relevant information to the authorities, protesting his innocence and citing his fears for his own life and the lives of his family members. The L'Aquila Sentence Supervision Court found, in particular, as follows:

“... the mafia group was still active in the Taurianova area, that the applicant had been the acknowledged head of a criminal organisation and that it was not apparent from the observation of his day-to-day conduct that he had engaged in a critical appraisal of his criminal past” (see paragraph 22 of the present judgment).

In the circumstances described above, it does not appear unreasonable to expect the applicant to assist the Italian authorities in saving lives by providing them with information.

4. The Italian legislation does not deprive persons sentenced to life imprisonment, for the most socially dangerous crimes, of any hope that they will one day be released. It provides for the possibility of conditional release but makes it contingent on cooperation with the judicial authorities. It should also be noted that, in practice, individuals who are not regarded as belonging to the upper echelons of the criminal organisation are not subject to this condition and serve their sentence under the ordinary prison regime.

The Italian legislation is not fixed and immutable: it has been amended and has been subjected on several occasions to constitutional review. It has also been debated and analysed in Parliament and in legal proceedings (compare with the standards set out in *Animal Defenders International v. the United Kingdom* ([GC], no. 48876/08, §§ 113-16, ECHR 2013 (extracts)); I note, incidentally, that the Court appears to overlook those standards in its case-law).

5. I also note that the Italian authorities enacted legislation that allows criminals involved in organised crime to obtain a remission of sentence if they cooperate with the prosecuting authorities at the investigation stage. Over the years, thousands of criminals have cooperated with the authorities and benefited from these measures. The threat which organised crime poses to “criminals turned informers” is not so significant as to paralyse the implementation of these measures. The applicant himself was convicted as a result of the cooperation with the judicial authorities of two such persons.

Clearly, the situation of an accused is different from that of a person sentenced to life imprisonment. The former, by cooperating with the judicial authorities, stands to derive considerable benefits from doing so (a substantial remission of sentence), whereas the latter can only secure a benefit that is remote and uncertain (the possibility of one day being allowed to apply for conditional release). Hence, the manner in which the risks and benefits are weighed up will differ in the two cases. Nevertheless, the threat which organised crime poses to individuals who breach the code of silence does not appear to be an insurmountable obstacle in implementing the various measures aimed at securing the cooperation of the criminals concerned with the prosecuting authorities.

The third-party interveners maintain that the measures complained of are ineffective and do not deliver the desired outcome as the persons concerned refuse in practice to cooperate with the judicial authorities. I note in that context that States have a certain margin of appreciation when it comes to criminal policy. While a review of the proportionality of restrictions on rights is a kind of review of the rationality of the interference in question, the Court is not competent to review as such the rationality of the criminal policies of the States Parties to the Convention. As has been emphasised in the case-law, “[a] State’s choice of criminal-justice system, including sentence review and release arrangements, is ... in principle outside the scope of the supervision carried out by the Court” (see *Harakchiev and*

Tolomov v. Bulgaria, nos. 15018/11 and 61199/12, § 250, ECHR 2014 (extracts)).

6. The majority express the following view in paragraph 118 (emphasis added):

“The Court infers from this that failure to cooperate is not **always** the result of a free and deliberate choice, nor does it necessarily reflect continuing adherence to ‘criminal values’ or ongoing links with the criminal organisation in question. Indeed, this was acknowledged by the Constitutional Court in judgment no. 306 of 11 June 1993, in which it held that the absence of cooperation did not necessarily indicate that the person still had links to the mafia organisation ...”

If I understand my colleagues correctly, they are of the view that the conditions attached to the release of a life prisoner must **always**, by their very nature, be a matter of free choice for the prisoner. As the majority see it, failure to comply with these conditions must in all cases be the result of a free and deliberate choice. This is an astonishing line of argument. The approach taken by the majority consists in assessing the national legislation in the abstract and calling it into question as a whole simply because it can have problematic consequences in some cases. In my view the relevant issue, in the context of the Court’s examination of an individual application, is not whether the choice in question is always free and deliberate, but rather whether the specific choice made by the prisoner concerned is free and deliberate.

7. The Court reasoned as follows in its judgment in *Hutchinson v. the United Kingdom* ([GC], no. 57592/08, § 42, 17 January 2017):

“... to be compatible with Article 3 such a sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continued incarceration of the prisoner. These grounds include punishment, deterrence, public protection and rehabilitation.”

This approach confirms that a sentence is a multi-dimensional legal instrument. The rehabilitation of the offender is a fundamental objective, but not the only one. The sentence imposed also has a retributive function, in giving a sense of justice not only to society but also, most importantly, to the victim. It also serves the purpose of deterring other potential offenders. It may pursue other aims and, in particular, may be regulated so as to reduce offending by helping the authorities to dismantle criminal organisations.

It should be pointed out at this juncture that international human rights law places very heavy emphasis on the deterrent function of sentences. There have been numerous judgments in which the Court found a particular sentence to be manifestly disproportionate to the seriousness of the offence. The sentence was held to be disproportionate to the nature of the offence committed, without the Court seeking to establish the applicant’s rehabilitation needs in the case in question. By way of example, the Court has previously adopted the following reasoning (emphasis added):

“... such a penalty cannot be considered apt to **deter** the perpetrator or other State agents from committing similar offences, nor can it be perceived as **just by the victims**” (*Sidiropoulos and Papakostas v. Greece*, no. 33349/10, § 95, 25 January 2018);

“... far from being rigorous, the penal and disciplinary system as applied in this case was not sufficiently **dissuasive** to effectively prevent illegal acts of the type complained of by the applicant” (*Zeynep Özcan v. Turkey*, no. 45906/99, § 45, 20 February 2007).

It is for the national legislature to implement penal policy by establishing the penalties that are deemed appropriate to the different crimes and offences and defining the specific aims of the penalty and their order of priority.

The reasoning of the present judgment suggests that rehabilitation has become the only legitimate aim of sentencing. I cannot agree with this approach, which leads to a tacit reversal of the *Hutchinson* case-law on this point. Furthermore, if the sole aim of the sentence is rehabilitation, how do we deal with individuals who committed a crime and are prosecuted many years later although they have repented of their crime in the meantime and completely changed personality?

8. Central to the majority’s line of argument is the notion that the system is based on an “irrebuttable” presumption that a prisoner who refuses to cooperate with the authorities is a danger to society. The term “irrebuttable presumption” has generally negative connotations in criminal matters. It suggests at first glance that individuals are liable to be the victims of injustice because of their inability to furnish evidence to the contrary.

I would observe in that connection that the very notion of an “irrebuttable presumption” is rightly criticised in the legal literature, which points out that rebuttable presumptions and “irrebuttable presumptions” comprise two entirely separate legal categories. An “irrebuttable presumption” is not a presumption that guides reasoning in order to justify a factual proposition on the basis of other factual propositions, but merely a legal rule which attributes certain legal consequences to certain factual circumstances (on this subject see, for instance, T. Gizbert-Studnicki, “Znaczenie terminu „domniemanie prawne” w języku prawnym i prawniczym” [The meaning of the term “statutory presumption” in legal language], *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 36, 1974, no. 1). An attempt can be made to present as an irrebuttable presumption any rule of law which provides for certain legal consequences whenever a particular set of factual circumstances occurs. However, such an approach adds nothing to our understanding of the law.

The applicant in the present case is still in prison not because he is presumed to be a danger to society, but because he received a specific sentence that took account of all the functions of sentences. He is incarcerated, in particular, because this is necessary in order to allow the

families of his victims, and Italian society in general, to feel that justice has been done, and to deter other potential offenders from committing similar crimes. There are therefore legitimate penological grounds for his continued detention.

9. In *Hutchinson*, cited above, the Court articulated the following principle (§ 44):

“Therefore prisoners who receive a whole life sentence are entitled to know from the outset what they must do in order to be considered for release and under what conditions.”

In my view, the Italian legislation is sufficiently clear and enables prisoners to regulate their own conduct; it thus respects the principle of legal certainty.

10. In paragraph 133 of the present judgment the majority express the following view:

“Lastly, as regards the Government’s assertions that the domestic system provides for two other remedies by which to obtain a review of sentence, namely a request for presidential clemency and an application for a stay of execution of the sentence on health grounds ..., the Court points to its relevant case-law, according to which the possibility for a prisoner serving a life sentence to be granted clemency 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 used since *Kafkaris* (cited above, § 127; see also *Öcalan*, cited above, § 203, and *László Magyar v. Hungary*, no. 73593/10, §§ 57 and 58, 20 May 2014).”

I note that in its judgment in *Iorgov v. Bulgaria (no. 2)* (no. 36295/02, 2 September 2010), and subsequently in *Harachiev and Tolumov* (cited above), the Court described the methodology to be applied in ascertaining whether the existence of a presidential power of clemency means that a sentence is compatible with the reducibility requirement. In both these cases the Court analysed in detail the legal arrangements and the way in which the power of clemency was exercised in practice. In § 262 of *Harachiev and Tolumov* it found that “the absence of any examples tending to suggest that a person serving a whole life sentence would be able to obtain an adjustment of that sentence and under what circumstances” was in no sense sufficient to demonstrate that the life sentence was *de facto* irreducible.

I observe that the majority declined to follow this methodology in the present case. The argument that the Government “have not provided any examples of convicted offenders sentenced to this type of life imprisonment who have obtained a reduction of their sentence by means of presidential clemency” (see paragraph 135 of the judgment) cannot be decisive. It is possible that no prisoner sentenced to life imprisonment has yet satisfied the criteria regarding rehabilitation such as to justify presidential clemency.

11. As stated above, the present judgment tacitly overturns certain principles set out in *Hutchinson*. Moreover, it is difficult to reconcile those judgments of the Court that place the emphasis on the deterrent effect of

sentences with those concerning presidential clemency. The result is a situation in which the Court's case-law concerning life imprisonment is becoming less and less readable and more and more unforeseeable.