



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2976/2017\*\*\*

<i>Communication submitted by:</i>	Mr Garri Maui Isherwood represented by counsel, Dr. Tony Ellis
<i>Alleged victim:</i>	The author
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	24 February 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 4 May 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	12 July 2021
<i>Subject matter:</i>	Continued detention after serving punitive sentences
<i>Procedural issues:</i>	Lack of substantiation, exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; conditions of imprisonment; social rehabilitation aim of imprisonment.
<i>Articles of the Covenant:</i>	2, 9, 10, and 14 (1)
<i>Articles of the Optional Protocol:</i>	2, 3, 5 (2) (b)

1. The author of the communication is Mr. Garry Maui Isherwood, a national of New Zealand born in 1977, and of half Māori ethnicity. He claims that the State party has violated his rights under articles 2, 9, 10 and 14 of the Covenant. The Optional Protocol entered into force for the State party on 26 August 1989. The author is represented by counsel.

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\* Adopted by the Committee at its 132nd session (28 June – 23 July 2021).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Wafaa Ashraf Moharram Bassim, Mahjoub El Haiba, Kobayyah Tchamdja Kpatcha, Duncan Laki Muhumuza, Carlos Gomez Martinez, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Hélène Tigroudja, Imeru Tamerat Yigezu, and Gentian Zyberi.

\*\*\* Individual opinions by Committee members Arif Bulkan, and Gentian Zyberi (dissenting) are annexed to the present Views

### The facts as submitted by the author

2.1 On 18 November 1999, the author was sentenced to 8 years in prison for (i) sexual intercourse with a minor (of 12 to 16 years old), (ii) living off the earnings of prostitution, and (iii) administering morphine to a minor. On 1 July 2003, he was released on parole. On 15 July 2003, he committed five other offenses: (i) sexual violation by rape of a woman over 16 (3 counts), (ii) sexual violation by unlawful sexual connection with a minor over 16 (4 counts), (iii) kidnapping (one count) and (iv-v) two drug offences (2 counts). On 21 May 2004, he was sentenced to preventive detention with a minimum period of imprisonment of 10 years on each charge under section 87 of the Sentencing Act 2002.<sup>1</sup> He was also denied parole for a minimum period of 10 years.

2.2 In 2004, the author filed an appeal against his convictions, but not the sentences imposed. The author's appeal was rejected by the Court of Appeal of New Zealand on 14 March 2005. A sentence appeal was subsequently filed by the author to the Court of Appeal. On 3 August 2010, the Court of Appeal quashed the sentence for the two drug offences because they were not offences for which the High Court had power to impose preventive detention under the Sentencing Act 2002, and substituted finite sentences of four years of imprisonment on both offences. The Court of Appeal upheld the sentence of preventive detention in relation to the author's offences involving sexual violation and kidnapping<sup>2</sup>. On 21 September 2010, the Supreme Court rejected the author's application for leave to appeal the Court of Appeal's judgement.<sup>3</sup> On 7 July 2011, he applied for the exercise of the Royal Prerogative of Mercy to the Governor-General,<sup>4</sup> which was denied on 17 September 2014. The author became eligible for parole on 21 April 2014. After a hearing held on 30 April 2014, the Parole Board ("the Board") denied him parole.<sup>5</sup>

2.3 In January 2015, the author filed a complaint on similar grounds as the present communication to the United Nations Working Group on Arbitrary Detentions (WGAD). The WGAD concluded that there was no violations of his rights.<sup>6</sup>

### Complaint

3.1 The author claims that he has been detained arbitrarily because, at the time of the submission of the present communication, he had served the punitive part of his sentence and was not detained for compelling reasons. In addition, he had not been given opportunities for his rehabilitation and reintegration, the assessment of his continued detention was not done by an independent body, and he was arbitrarily detained in identical conditions to those serving a punitive sentence. He claims that domestic remedies were exhausted as he brought

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<sup>1</sup> In the State party's context, preventive detention is defined as follows: "An indeterminate prison sentence; prisoners may be released on parole but remain managed by Corrections for the rest of their life and can be recalled to prison at any time". See the New Zealand Department of Corrections' official website at [https://www.corrections.govt.nz/working\\_with\\_offenders/courts\\_and\\_pre-sentencing/types\\_of\\_sentences](https://www.corrections.govt.nz/working_with_offenders/courts_and_pre-sentencing/types_of_sentences) (accessed 24 June 2021).

<sup>2</sup> The author applied for an extension of time to appeal against his sentence and for leave to file further evidence. If an extension of time was granted, the author's counsel would have argued that the sentence of preventive detention was manifestly excessive, the statutory requirement for the imposition of a sentence of preventive detention were not met and preventive detention involves arbitrary detention, in breach of article 9. The Court concluded that there was no arguable case based on incompetence of counsel, that the new counsel was not able to argue why there was a delay or why new evidence would be relevant to the author's sentencing, and that it is difficult to assess why preventive detention is inconsistent with right protected by article 9 and the Bill of Rights Act.

<sup>3</sup> The author's Counsel sought to make a general challenge to the State party's preventive regime on the basis that it involves arbitrary detention contrary to article 9.

<sup>4</sup> The author's counsel applied to submit fresh evidence and alleged that witnesses were not called during the trial by the former author's counsel, and that this counsel also failed to properly cross examine the author and erred in the conduct of conviction appeal. The Royal Prerogative of Mercy concluded that a large proportion of the new evidence was not relevant or inadmissible, the counsel adequately cross examined the complaint and no error was found in the author's appeal for conviction.

<sup>5</sup> The Board assessed the author as posing a very high risk of sexually violent offending or other serious violent offense within two years of release into the community.

<sup>6</sup> See A/HRC/WGAD/2016, 7 September 2016.

the matter before the Supreme Court and applied to the Royal Prerogative of Mercy and that no Covenant remedy was available to him in the State party.

3.2 The author submits that, in violation of article 2(2) and (3) of the Covenant, there is no effective remedy for violations of the Covenant in New Zealand, because the Covenant is not incorporated in the domestic law and the New Zealand Bill of Rights Act 1990 (the New Zealand Bill of Rights Act) is only a partial attempt to enact the Covenant. Therefore, the Courts rely on jurisprudence of the Supreme Court instead of the Covenant's provisions<sup>7</sup>. The author refers to the Committee concluding observations on New Zealand<sup>8</sup> and General Comment No 31,<sup>9</sup> which states that a failure by a State party to investigate can give rise to a separate breach of the Covenant. The counsel of the author also alleges that he has been criticised<sup>10</sup> and threatened with sanctions<sup>11</sup> by the New Zealand courts in other domestic cases for raising arguments based on the Covenant.

3.3 The author argues that none of the international treaty obligations in the context of Preventive Detention are considered by the Superior Courts, let alone the Board. The author submits that there is an ongoing struggle to raise Covenants issues in the State party<sup>12</sup>, such as the over-representation of Māori people in the criminal justice system, although this issue has been outlined notably by the Committee's sixth periodic report,<sup>13</sup> the Committee Against

3.4 The author submits that New Zealand has violated articles 9 (4) and 14 (1) of the Covenant because his parole was denied by a Board which is not independent and impartial and because the Board has not provided any compelling reasons for denying him parole. The author claims that the Board should have the independence and impartiality of a court, citing General Comment No 32 and the Committee's decision in *Rameka et al v. New Zealand*.<sup>14</sup> Therefore, the author has been arbitrarily detained as no independent tribunal has the competency to release him.<sup>15</sup> The author submits that independence includes at least three components: financial security, security of tenure, and administrative independence<sup>16</sup> and that none of those are present in the Board. The author also points out that the Board fails to hold its hearings public, as they are held in prison. Media are only rarely admitted.

3.5 In *Miller and Carroll*, the counsel's author raised before domestic courts, that the Board should have the independence and impartiality of a court and contended that domestic courts did not properly consider the State party's obligation under the Covenant to provide an independent Board. The author submits that his counsel did not litigate the same point in the present case, as it would have been qualified of "political treatise".

3.6 In breach of articles 9(1), 10 (3) of the Covenant, the author claims that the State party failed to provide him sufficient rehabilitative opportunities prior to the completion of the non-parole period of his imprisonment, that his detention continued after this point and that the conditions of his preventive detention were the same as the punitive part of his sentence. He

<sup>7</sup> The author also refers to the 5th Concluding Observations on New Zealand periodic report: CCPR/CO/75/NZL at para 8: *The State party should take appropriate measures to implement all the Covenant rights in domestic law*".

<sup>8</sup> 5<sup>th</sup> Concluding Observations report on New Zealand (CCPR/C/NZL/5), §7.

<sup>9</sup> General Comment No 31, CCPR/C/21/Rev.1/Add.13, § 3 and 14.

<sup>10</sup> *R v Exley* CA279/06 [2007] NZCA 393, § 21

<sup>11</sup> *Charta v The Queen* [2008] NZCA 466 (10 December 2008), § 38, 39.

<sup>12</sup> The author refers to comments given by Judges in domestic cases where he was a counsel. The author does not provide the abstracts of those cases.

<sup>13</sup> CCPR/C/NZL/CO/6, § 26.

<sup>14</sup> *Rameka v New Zealand*, CCPR/C/79/D/1090/2002.

<sup>15</sup> The author refers to *Miller and Carroll* domestic courts documents, which was also brought by the same counsel before the Committee (CCPR/C/121/D/2502/2014) and had not been adopted at the date of the submission of the present communication.

<sup>16</sup> *Macklin v New Brunswick* [2002] SCC 13 majority judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ, §34 & 40 and The Commentary says: The Bangalore Principles of Judicial Conduct are the undisputed international benchmark for the conduct of judiciaries. Madam Justice Levers in Hearing on the Report of (The Cayman Islands) [2010] UKPC 24 para 48.

claims that his continued imprisonment after the non-parole period is not based on any new evidence or any new conviction and is thus arbitrary.

3.7 The author argues that, in view of the fact that he was not provided with any psychological treatment or rehabilitation as a sex-offender with drugs and alcohol problems,<sup>17</sup> the State party has not, and is not in a position to show that the author's rehabilitation could have been achieved with less intrusive means than his continued detention.<sup>18</sup> Although there was an obligation to provide him with treatment at the early stages of his sentence,<sup>19</sup> the author received treatment from the Special Treatment Unit Programmes only after the first Board hearing which precluded his release, as the Board did not have any element to conclude that he was not an undue risk to the public. In addition, during his initial ten years of imprisonment, the author has not undergone any specific counselling directed to counteracting the negative effects of long-term imprisonment. There is currently no specialised treatment programme or group available in the State party's prisons to address the potentially harmful effects of long-term imprisonment.

3.8 The author alleges that the Board has not analysed the legality of his continuing detention and has relied exclusively on the finding of one expert's psychological report stating that he poses too high of a risk to be released on parole. The author submits that there was no analysis of the potential "high-risk of sexually violent offending", whether by the psychologist, or by the Board<sup>20</sup>. By using this vague risk assessment or suspicion that the author might reoffend, the Board has shown that it has no real intention of releasing preventive detainees. The author submits that the risk-assessment provided by the Board did not reach international standards.

3.9 The author submits that inmates sentenced to preventive detention ought to be provided treatment from the commencement of their sentence, and placed in a therapeutic environment to enhance rehabilitation chances and not kept in a standard prison. The author argues that at the expiry of his non-parole period, he was only detained for the purposes of public protection. Accordingly, he should not have been detained in the same conditions as persons still serving the punitive components of their sentences.<sup>21</sup>

3.10 The author submits that the current State party's system of preventive detention, and the policy surrounding the rehabilitative treatment of offenders sentenced to preventive detention, has created a seemingly never-ending arbitrary detention for all offenders sentenced to preventive detention. The author has been put in an impossible and circular position, in breach of his rights under Articles 10(3) and 9(1).

3.11 The author also claims a violation of his rights under article 14 (1) of the Covenant because his first lawyer failed to provide him with effective defence throughout the trial. The author argues that his right to a fair trial under article 14 (1) was breached during his trial because he was not able to defend himself by denouncing the wrongful behaviour of the complainant to his sexual assault without his previous convictions being put in evidence. The author claims that his trial both at the stage of the trial court and the first appeal court did not meet the fair trial guarantees since his defence lawyer deprived him of an effective defence

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<sup>17</sup> Prior to being detained, the author was attacked and stabbed about 17 times. He was then prescribed Tramadol for 10 years, which he took principally while in detention. Painkillers prescriptions changed over this period and it was decided to withdraw him from this medication, shortly before his hearing before the Board. At the same period, he began the Drug Treatment Unit Programme in January 2013, but was exited in April 2013 as he used Benzodiazapines. He re-started the programme at the beginning of 2014, but self-exited, in accordance with his safety plan. The author suffers from anxiety caused by stabbing, aggravated by his prison environment. According to psychological reports, his drug addictions probably was initiated by some of his family members, who gave him Valium when he was a child, to ease suffering while being abused, but probably also to make him more compliant to sexual abuse by the same family members.

<sup>18</sup> *Fardon v. Australia* (CCPR/C/98/D/1629/2007) §7.4.

<sup>19</sup> *Ibid.*

<sup>20</sup> The author refers to *Fardon v Australia* and *Tillman v Australia*, 1635/2007.

<sup>21</sup> Human Rights Committee General Comment No. 35 on Article 9 (liberty and security of person), CCPR/C/GC/35, 16 December 2014, paragraph 21.

(not calling witnesses unless absolutely necessary and delegating all contact with witnesses to his deputy). These claims have been rejected by the Supreme Court.

### **State party's observations on admissibility and merits**

4.1 On 14 May 2019, the State party submitted its observations on admissibility and merits and claims that the complaint should be dismissed as there has been no violation of articles 2, 9, 10 and/or 14. The State party did not challenge the admissibility of the communication.

4.2 The State party reiterates the facts of the complaint. The State party points out that the author's minimum non-parole period ended in April 2014. In January 2013, the author commenced a Drug Treatment Unit (DTU) Programme. In April 2013, the author was removed from the DTU programme because a drug test revealed that he had taken a prohibited drug. He commenced the DTU programme for a second time in February 2014. It was reported by the management that he was self-sabotaging himself. The author recognised that his behaviour and health were a barrier to him engaging in the programme and chose to leave in March 2014.

4.3 On 30 April 2014, the author had his first Board hearing, which denied him parole.<sup>22</sup> The Board noted that (i) the author was still posing a very high risk of sexually violent reoffending; (ii) the author accepted that he had a considerable amount of work to do to address the causes of his offending, linked to his excessive drug use; (iii) the author was willing to return to the DTU programme, to which the Board responded that this decision would depend on the prison authorities. In September 2014, a multi-disciplinary team of eight prison professionals determined that it was in the best interests of the author and other prisoners that he would not complete the November DTU programme. In October 2014, the author completed a four-sessions Alcohol and Other Drug (AOD) Support Programme.

4.4 On 21 April 2015, the Board held a second hearing, based on the Parole Assessment Report and an updated psychological assessment. The Board noted that the author's risk of sexually violent offending continued to be very high and denied him parole.

4.5 On 30 June 2016<sup>23</sup>, the Board held another hearing and concluded that without completing his psychologic treatment, demonstrating a sustained period of change and agreeing to spend time in a low security self-care environment before he could be assessed for the Adult Sex Offender Treatment Programme, the author would still pose an undue risk. The Board also noted that the author did not actively seek parole, and that, in accordance with the 2 year review cycle under section 21(2) of the Parole Act 2002, he would have the next hearing on 5 March 2018. On 26 August 2016, the author asked the Board to review its 30 June 2016 decision and alleged that he had been arbitrarily detained after his parole eligibility date as he had not been held in non-punitive conditions and had been denied timely treatment, thus the assessment of his risk was inadequate to justify his detention. On 16 September 2016, the Board found that no error of law had occurred, and noted that New Zealand's legislation did not draw distinctions between punitive and non-punitive conditions in preventive detention but rather determined condition's custody by security classification. The Board also noted that the author was currently engaged in programmes for his release and that it was not for the Board but rather for the State party's courts to determine whether a detainee is being arbitrarily detained.

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<sup>22</sup> The Board based its decision on the Department of Correction's 2014 Report, which stated mainly that the author had been subject to 26 proven charges of misconduct, that his rehabilitation in custody should be a priority, that the author had commenced but failed to complete the DTU programme twice, that the author should complete a lower intensity programme to renew his confidence to cope in a group context, that the author was appealing his conviction, which might preclude his ability to attend treatment and appeared to be in direct conflict with his expressed motivation to complete the adult sex offender programme, that the author had been employed in the central kitchen and various unit-based roles.

<sup>23</sup> The Board hearing was supposed to take place on 31 March 2016, but the counsel was unavailable at that time.

4.6 On 17 August 2017, the author was successfully transferred to the low security unit at Christchurch Prison. On 24 October, the author was moved to the DTU unit to start its programme, starting in late November 2017. After completion of the DTU programme, the author would be referred to the Adult Sex Offender Treatment Programme<sup>24</sup>.

4.7 Regarding the author's claim on breaches of article 2 of the Covenant, the State party first rejects the allegations that the counsel's author was threatened with sanctions and criticized by the Court for raising argument based on the Covenant. The State party argues that these allegations rely on selective quotations from judgement and lack context and substantiation. Secondly, on the incorporation of the Covenant in the State party's legislation, the State party asserts that New Zealand has incorporated the Covenant through a range of measures, including the New Zealand Bill of Rights Act, the Parole Act 2002, the Corrections Act 2004, and other administrative measures. Thirdly, regarding the availability of effective remedies, the State party argues that alongside judicial mechanisms such as appeal and judicial review, the State party operates further administrative mechanisms which may investigate allegations of violations, such as the Ombudsman and a range of other independent bodies. The specific situation of the author regarding allegations of breach of the Covenant for access to remedies are exposed in the following paragraphs.

8 Regarding an alleged breach of articles 9 (4) and 14 (1) of the Covenant on the basis that the Board is not an independent and impartial tribunal and that the author has therefore been arbitrarily detained, the State party submit that they should be dismissed. The State party notes that the author refers to *Miller and Carroll* and points out that, since that communication, the Parole Act 2002 came into force, replacing the Criminal Justice Act 1985, and that there has therefore been a change in the regime governing the parole system since then.

4.9 The State party explains that the Board is an independent statutory body constituted under the Parole Act 2002, which aims at considering "offenders for parole and, if appropriate, to direct offenders to be released on parole" and then determine their release conditions and monitor their compliance.<sup>25</sup> In its assessment, the Board must balance the safety of the community with the offender's detention, based on all relevant information available.<sup>26</sup>

4.10 The State party submits that Article 14(1) does not apply to the Board's role because the Board was not involved in determining the criminal charge against the author. This is the function of courts in New Zealand. The author's appearance before the Board were not for the purpose of determining the author's "rights and obligations in a suit at law".<sup>27</sup> As a preventive detainee, the author has no entitlement to parole that can be enforced before the Board. The author can however challenge decisions on his application for parole by judicial review to the High Court. The State party refers to General Comment 31, paragraphs 16 and 17 and argues that parole proceedings similarly do not involve the determination of "any entitlement to the person concerned", as the Committee has held in relation to prison disciplinary proceedings against prisoners. Nevertheless, if the civil limb was applicable to parole proceedings, in *YL v Canada*,<sup>28</sup> the Committee noted the need to look at the procedures "globally", including whether there existed a right to seek judicial review by the courts of administrative decisions. If judicial review was ultimately available, recourse to that remedy would satisfy the requirement of access to a competent, independent and impartial tribunal for determination of a "suit at law". In any case, the right to seek judicial review under New Zealand law of the Board's decision meets the criteria of article 14(1).

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<sup>24</sup> According to the 2019 Board's decision provided by the author, the author completed the High Risk Personality Programme and the DTU Programme by 2018, and graduated the Adult Sex Offender Treatment Programme in May 2019.

<sup>25</sup> Parole Act 2002, sections 108 and 109.

<sup>26</sup> Parole Act 2002, section 7.

<sup>27</sup> The State party cites: *Vaillancourt Solicitor General of Canada* (1988) 66 C.R. (3d) 66 ; *R (West) v Board* [2005] 1 WLR 359 (HL) ; *Ganusaukas v Lithuania* (Appn No 47922/99 ECHR); *Brown V United Kingdom* (Appn No 968/04, 26 October 2004, ECHR); *Aldrian v Austria* (1990) 65 DR 33, 342 (European Commission of HR).

<sup>28</sup> *YL v Canada*, (CCPR/C/27/D/112/1981).

4.11 The State party submits that the Board is sufficiently independent, impartial and adequate in procedure to constitute a “court” within the meaning of article 9(4) even though it does not have all the attributes of judicial court,<sup>29</sup> and that the Committee has accepted it.<sup>30</sup> There is no ability for the Executive or any other persons or body outside the Board to direct or influence the making of parole decisions. In addition, parole assessment procedures comply with article 9 (4) because Parole Board decisions are, without restrictions, subject to judicial review (no application for leave is required). The author is receiving regular periodic reviews by an independent body in line with the Committee’s General comment 35 and he is not arbitrarily detained. Additionally, the WGAD determined that the New Zealand Board was sufficiently independent.<sup>31</sup>

4.12 On the author’s lack of rehabilitation, the State party submits that according to New Zealand law, sentences are not divided into “punitive” and “non-punitive” periods. All sentences are administered according to the purpose of the Corrections Act 2004 and offenders sentenced to preventive detention are determined by security classification. Offenders are provided with opportunities for rehabilitation and re-integration, and as the release date of an offender approaches, increasing emphasis is placed on these opportunities. As explained in paragraphs 4.2 to 4.6, the State party submits that the author has received an array of opportunities and services that work towards his rehabilitation<sup>32</sup>. The State party denies the allegations that the author has not been assessed or placed on a specialised treatment programme. The author’s communication itself refers to a psychological report made for the purpose of his assessment. The State party argues that the author has been offered a significant opportunity to reduce his risk but, due to his own behaviour and decisions, his progress has been delayed.<sup>33</sup> This statement was confirmed by the findings of the WGAD. The WGAD also noted that the author’s rehabilitation, at the time of the communication, could only be achieved through preventive detention.<sup>34</sup>

4.13 As to the allegations that the Board relied exclusively on the psychologist’s assessment of risk, the State party submits that the Board’s assessment is undertaken in a robust process, which reflects international best practice, to determine whether the offender continues to pose an undue risk to public safety. The author did not challenge the risk assessment made in relation to his case until his most recent Board hearing in 2016.<sup>35</sup> The WGAD also determined that there were sufficient guarantees around the Board’s risk assessment tools to ensure that it did not breach the author’s rights.

4.14 On the allegations that his continued imprisonment after his non-parole period was not based on any fresh evidence, nor was there any new conviction on the basis of which to detain him, the State party responds that there is no need for any conviction, as the sentence of preventive detention was imposed lawfully on the author following his conviction. The author has appealed his conviction, but was unsuccessful. The State party refers to the WGAD’s finding which states that the author continues to serve the sentence that was imposed at the time of his conviction in 2004 including the preventive element.<sup>36</sup>

<sup>29</sup> The State party refers to the drafting history of article 9 (4) Manfred Novak, CCPR Commentary, 2<sup>nd</sup> ed, N P Engel, USA 2005 at 235, 237); *A. v Australia* (CCPR/C/59/D/560/1993) §9.3; *Vuolanne v Finland*, (CCPR/C/35/D/265/1987), §9.4; *Bandajevsky v Belarus* (CCPR/C/86/D/1100/2002), §§10.3-10.4.

<sup>30</sup> *Rameka v New Zealand*, (CCPR/C/79/D/1090/2002), §7.4 and *Manuel v. New Zealand*, (CCPR/C/91/D/1385/2005), §7.3.

<sup>31</sup> *Isherwood v New Zealand* (A/HRC/WGAD/32/2016), §60-62.

<sup>32</sup> The author was employed in the prison, was receiving pastoral care and psychologic assistance and completed two rehabilitation programmes.

<sup>33</sup> The State party refers to *Dean v New Zealand* (CCPR/C/D/1512/2006), §7.5.

<sup>34</sup> *Isherwood v New Zealand* (A/HRC/WGAD/32/2016), §52.

<sup>35</sup> See paragraph 4.5.

<sup>36</sup> The WGAD stated that the author “has not been charged with any further offence that would violate his right to the presumption of innocence under article 14(2) of the ICCPR, nor has he been subjected to double punishment under article 14(7) of the ICCPR”. *Isherwood v New Zealand*, (A/HRC/WGAD/32/2016), §64.

4.15 The State party refers to *Rameka vs New Zealand*<sup>37</sup> and recalls that the Committee found a breach of Article 9 (4) because the non-parole period exceeded a previously indicated finite period of imprisonment. Significantly, however, the Committee concluded that New Zealand's system of preventive detention was not arbitrary and did not breach the standards of humane treatment in Article 10.<sup>38</sup>

4.16 The WGAD found that “there are compelling reasons “arising from the gravity of the crimes committed and the likelihood of the detainee’s committing similar crimes in the future” which justified the author’s ongoing preventive detention”.<sup>39</sup> The WGAD analysed the High Court’s decision to order preventive detention and the Board’s decisions in 2014 and 2015 to refuse the author parole and determined that their decisions were justified.<sup>40</sup> The WGAD also determined that while the author did not appear to be subject to different material conditions from prisoners serving finite sentences, the conditions of his preventive detention were sufficiently distinct from a punitive prison sentence because of the opportunities that are being provided to him to access psychological and other care aimed at his rehabilitation and release.<sup>41</sup>

4.17 On the argument that the author’s trials and appeals amounted to a manifest injustice alleging several errors to have occurred during his trial, appeals, and Prerogative of Mercy, the State party submits that his allegations do not establish a violation of article 14 (1). The State party submits that the Governor-General’s assessment of the author’s Prerogative of Mercy does not attract the protection of the fair trial rights under article 14 (1) because it is not a “suit at law” and it is not involved in the determination of a criminal charge. The State party further submits that the author has benefitted from appeals of his conviction to the Court of Appeal and Supreme Court, and separate appeals of his sentence to the Court of Appeal and Supreme Court. He has also had his case reviewed by the Governor-General in his Royal Prerogative of Mercy application. The State party recalls that the Committee typically dismisses generalised complaints of unfair trials under article 14 (1).<sup>42</sup>

4.18 On the allegations that the author’s rights under 14 (1) were breached because he was not able to attack the character of the complainant to his sexual assault without his previous convictions being put in evidence, the State party refers to the Ministry of Justice report and recalls that an attack on the complainant’s character would not have allowed the “prosecution to have similar fact/propensity evidence about an accused admitted on a lower standard that would otherwise apply”.

#### **Author’s comments on the State party’s submission**

5.1 On 31 December 2019, the author submitted his comments on the State party’s observations.

5.2 The author states that the Covenant has not been given full effect in the State party’s domestic law for at least 30 years and that no Covenant remedy has ever been granted by a New Zealand’s Court<sup>43</sup>. The author refers to New Zealand’s periodic report to support his argument.<sup>44</sup>

5.3 The author points out to Concluding Comments or Observations of the

<sup>37</sup> *Rameka v New Zealand*, (CCPR/C/79/D/1090/2002), §7.4 and *Manuel v. New Zealand*, (CCPR/C/91/D/1385/2005).

<sup>38</sup> *Dean v New Zealand*, (CCPR/C/95/D/1512/2006), § 7.4.

<sup>39</sup> *Isherwood v New Zealand* (A/HRC/WGAD/32/2016) § 46.

<sup>40</sup> *Ibid*, § 51.

<sup>41</sup> *Ibid*, § 57.

<sup>42</sup> *JK v Canada* (CCPR/C/23/D/174/1984), § 7.2 and *RM v Finland* (CCPR/C/35/D/301/1988), §6.4, *Van Meurs v The Netherlands*, (CCPR/C/39/D/215/1986), §7.1.

<sup>43</sup> The author cites Dr. Andrew and Petra Butler, *The New Zealand Bill of Rights Act* (2nd ed., LexisNexis, Wellington, 2015), § 4.5.2 : [...] “overall the impact of the ICCPR has, to date, been largely rhetorical rather than interpretative” [...]. and § 4.5.12 and 4.5.14.

<sup>44</sup> Fourth periodic Report, New Zealand, CCPR/C/NZL/2001/4, § 10 and Concluding Observations on the fifth periodic report, CRC/C/NZL/CO/5 §6.



Committee on a number of countries in respect of Article 2.<sup>45</sup> The author notes that in *Miller and Carroll v New Zealand*,<sup>46</sup> the Committee concluded that article 2 cannot be invoked on its own, but underlines the findings of *Tshidika v Democratic Republic of Congo*<sup>47</sup> and argues that in this case other violations of the Covenant under articles 9, 10 and 14 are linked with article 2 and so fit in the exception. The author also deplores that the Views of the four breaches found by the Committee to date in respect of the State party have not been fully implemented.<sup>48</sup> When combined with the current communication, these responses are sufficient to substantiate, that the articles are inextricably linked within the meaning of *Tshidika v DRC*, in breach of article 2. The author therefore invokes a breach of article 2 (2) and 2 (3) on the basis that no remedy is available under the Covenant in New Zealand, that this constitutes an ongoing violation, and that the Court of Appeal relying on Supreme Court Jurisprudence rather than tackle Covenant points requires them to be brought before the Committee, not the New Zealand's Court.

5.4 The author reiterates that the Board lacks independence and refers to *Miller and Carroll* where the Committee concluded that the State party failed to show that judicial review over the lawfulness of detention is available to the authors in order to challenge their continued detention, pursuant to article 9 (4) of the Covenant.<sup>49</sup> As to the State party's argumentation that article 14 (1) does not apply to the Board, the author argues that he was imprisoned by a criminal sentencing court and process, and the remaining part of his sentence is inextricably linked to that criminal sentencing, which is reflected in the New Zealand Sentencing Act (previously the Criminal Justice Act). Given that the Board stand down period is 2 years before a parole hearing, the Board is effectively determining that a further two years imprisonment will continue<sup>50</sup>, or not, which is at the heart of the criminal law.

5.5 The author submits that, in August 2019, the Board concluded that it was time to move on to the reintegration in-prison phase, and that there would be a new assessment in early August 2020.<sup>51</sup> The author argues that no reasons are given as to why he is an undue risk, and that the delay in taking this decision was too long, as he had been in prison for 20 years. The author argues that, as the decision stated that he would be detained for another further 12 months, article 14 (1) applies and was breached, in light of the Committee's View on *Miller and Carroll v New Zealand*.

5.6 The author asserts that his conditions and treatment are, although for a lesser period, on par to the ones of the authors of *Miller and Carroll's* case, but are nevertheless considerable in their own rights. The author argues that group therapy could be categorised as lack of dignity and respect,<sup>52</sup> positively dangerous (physically and psychologically), as he is a Māori, and considered at the bottom of the prison social scale due to his offense,<sup>53</sup>

<sup>45</sup> The Author cites, amongst others: Australia, Concluding observations of the Human Rights Committee: Australia. 24/07/2000; Germany A55/40, §§ 498-528; CCPR/CO/80/DEU, 4 May 2004.; Ireland. 24/07/2000 A/55/40, §§ 422-45.

<sup>46</sup> *Miller and Carroll v New Zealand*, §7.3.

<sup>47</sup> Communication No. 2214/2012 Views adopted on 5 November 2015, para. 5.5.

<sup>48</sup> The author points out that all communication have been advanced by current counsel and refers to: *Rameka v. New Zealand* (CCPR/C/79/D/1090/2002), *Dean v New Zealand* (CCPR/C/95/D/52/2006), *EB v New Zealand* (CCPR/C/89/D/1368/2005), and *Miller and Carroll v New Zealand* (CCPR/C/121/D/2502/2014)

<sup>49</sup> *Miller and Carroll v New Zealand*, (CCPR/C/121/D/2502/2014) §§ 8.14 – 8.16.

<sup>50</sup> Section 21 (2) Parole Act 2002 states that the Board must consider for parole every offender who is detained in a prison at least once in every 2 years after the offender's last parole hearing unless (a) the offender has a new parole eligibility date that is more than 12 months after his or her last parole hearing (in which subsection (1) applies); or (b) the offender is subject to a postponement order.

<sup>51</sup> The Board's decision stated that by March 2018, the author had completed the High Risk Personality Programme, the Drug Treatment Programme (DTP). In May 2019, he had graduated from the Adult Sex Offender Treatment Programme (ASOTP) where he was working as a mentor. He is assessed at moderate risk/high risk of sex offending. The Board explains that he would be supported by his mother, sister, and community.

<sup>52</sup> The author refers to: *New Connections: The Engagement in Group Therapy of Incarcerated Men Who Have Sexually Offended Against Children*, Thesis for PhD in Social Work, Canterbury University NZ, 2000, p 75-76.

<sup>53</sup> The author refers to the "inmate code" and studies of Vaughan and Sapp (1991) and Hogue (1993).

especially when the programme does not factor in Māori elements such as recognised by the Minister of Corrections.<sup>54</sup> The author argues that the State party did not provide any reason or substantiation as why his refusal to attend group therapy could not have been overcome by individual therapy in his home region prison and that he was never assessed and found unsuitable for Adult Sex Offender Treatment Programme as alleged by the State party. Moreover, the author was particularly affected by the abrupt interruption of his pain killer medicine, which he had been taken for 10 years and to which he was addicted.

5.7 According to the author, the reasons provided by the Board for his continued detention are not compelling and could rather lead towards a pathologic psychological state.<sup>55</sup> The author further argues that the Board's assessments are not tailored to Māori people, as they are overrepresented and discriminated in the criminal justice system.<sup>56</sup> According to studies, over 50%<sup>57</sup> of the prison population is of Māori ethnicity, but only 21% of the prison staff and 7.3%<sup>58</sup> of the psychologists are Māori. The author argues that it has been proven that the ethnicity of therapy providers is important for the therapy to succeed and for the Māori prisoners to feel engaged. Moreover, the author points out that the State party has not met the recommendations of the 6<sup>th</sup> Concluding Observation on New Zealand, where it advised to eliminate discrimination against Māori people in the administration of justice, including through training programmes for penitentiary personnel.<sup>59</sup>

5.8 The author reiterates his argumentation on a breach of article 14 (1) and stresses that he does not seek the present communication as a further right to appeal. He further argues that article 14 (1) applies to the Royal Prerogative of Mercy, referring to domestic case of *Yash v Legal Services Agency*, where the High Court determined that the prerogative of mercy was incidental to criminal proceeding and qualified for legal aid.<sup>60</sup> Finally, the author points out that the establishment of the Criminal Cases Review Commission under the Crimes Cases Revision Committee Act 2019 is a recognition that the system through which he went domestically was failing.

#### **Author's further observations**

6. On 16 September 2020, the author informed the Committee that he was finally released on parole on 1 September 2020 and is subject to lifetime recall for any breach of conditions.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

<sup>54</sup> The Dominion Post, \$98m for Māori prison pathway, May 11, 2019, p 2. : "Corrections Minister Kelvin Davis said the \$98 million investment from the "Wellbeing Budget" as a major first step to breaking the cycle of Māori reoffending and imprisonment by changing the way Corrections operated "We are acknowledging that our system does not work for the majority of Māori."

<sup>55</sup> According to the following study, long-term imprisonment leads to mental health conditions. Professor A.J.W. Taylor, *The Effects of Long Term Imprisonment*, 16 February 2006, §§148 – 152.

<sup>56</sup> Human Rights Committee concluding observations on New Zealand, CCPR/C/NZL/CO/6, §26.

<sup>57</sup> [https://www.corrections.govt.nz/resources/research\\_and\\_statistics/quarterly\\_prison\\_statistics/prison\\_stats\\_march\\_2019.html#ethnicity](https://www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2019.html#ethnicity)

<sup>58</sup> Michelle Levy & Waikaremoana Waitoki, *Māori Psychology Workforce & Māori Course Content Data*, *University of Waikato*, 2015, at [https://researchcommons.waikato.ac.nz/bitstream/handle/10289/9847/Maori Psychology](https://researchcommons.waikato.ac.nz/bitstream/handle/10289/9847/Maori%20Psychology)

<sup>59</sup> Human Rights Committee concluding observations on New Zealand, CCPR/C/NZL/CO/5, para. 12.

<sup>60</sup> 2006 19 PRNZ 320, paragraphs 11, 14, 16. This position was also quoted here *The Costs and Funding of Civil Litigation: A Comparative Perspective*, Bloomsbury Publishing, London 2010, p 440.

7.3 With regards to the author's allegation that the State party has not met its obligations under article 2 (2), the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol. The Committee reiterates that the provisions of article 2 cannot be invoked in a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under articles 9 and 14, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider examination of whether the State party has also violated its general obligations under article 2 (2), read in conjunction with articles 9 and 14, of the Covenant, to be distinct from examination of the violation of the author's rights under articles 9 and 14 of the Covenant. The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant and thus inadmissible under article 3 of the Optional Protocol.

7.4 The Committee takes note of the author's allegation that he did not have access to effective remedy in violation of article 2 (3) because the Covenant is not incorporated in the domestic law and the Courts rely on jurisprudence of the Supreme Court instead of the Covenant's provisions. The Committee also takes note of the State party's argument that New Zealand has incorporated the Covenant through a range of measures, including the New Zealand Bill of Rights Act, the Parole Act 2002, the Corrections Act 2004, and other administrative measures. The Committee also takes note of the State party's argument that alongside judicial mechanisms such as appeal and judicial review, the State party operates further administrative mechanisms which may investigate allegations of violations, such as the Ombudsman and a range of other independent bodies. In view of the foregoing, the Committee concludes that the author has failed to sufficiently substantiate these claims for purposes of admissibility and therefore declares them inadmissible under article 2 of the Optional Protocol.

7.5 The Committee takes note of the author's allegations that the State party violated his right to a fair trial, as established in article 14 (1) of the Covenant, because his first lawyer failed to provide him with an effective defence, therefore his trial both at the stage of the trial court and the first appeal court did not meet the fair trial guarantees. The Committee also takes note of the State party's arguments that the author has benefitted from appeals of his conviction to the Court of Appeal and the Supreme Court, and separate appeals of his sentence to the Court of Appeal and Supreme Court, and that his case was reviewed by the Governor-General in his Royal Prerogative of Mercy application. The Committee notes that the author has not substantiated his claim of a violation of his right to fair trial, nor has he shown how the defence of his first lawyer before the courts gave rise to a violation of his right to be heard by a competent, independent and impartial tribunal, particularly given the fact that he was able to appeal these decisions before the courts and the Royal Prerogative of Mercy. In view of the foregoing, the Committee concludes that the author has failed to sufficiently substantiate these claims for purposes of admissibility and therefore declares them inadmissible under article 2 of the Optional Protocol.

7.6 The Committee notes the authors' allegations under articles 9 (4) and 14 (1) of the Covenant that because the New Zealand Parole Board is not independent and impartial, he is incapable of release by an independent tribunal, resulting in his arbitrary detention. On the other hand, the Committee notes the State party's observation that, as determined by the domestic courts, article 14 (1) does not apply to the Board. The Committee also notes the State party's information according to which, since Miller and Carroll, the Criminal Justice Act 1985 was replaced by the Parole Act 2002 and triggered a change in the regime governing the parole system since then. The Committee further notes that the Board was not acting in a judicial capacity because it was reviewing the appropriateness (not the lawfulness) of the authors' detention.

7.7 The Committee recalls its Views in *Rameka v. New Zealand*, in which it considered whether the Parole Board "should be regarded as insufficiently independent, impartial or deficient in procedure", and reached the conclusion that it was not shown that this standard

was met, especially given that decisions of the Board are subject to judicial review.<sup>61</sup> The Committee notes that the WGAD came to a similar conclusion when analyzing the independence of the Board regarding the present case<sup>62</sup>. The Committee further notes that, contrary to *Miller and Carroll*, the author has not challenged the independence of the Board in front of domestic courts, nor was he denied parole in a similar manner as in the *Miller and Carroll's* case. Accordingly, the Committee considers that the author has not fulfilled his obligation to exhaust domestic remedies and finds the alleged violations of articles 9(1) and 14 (1), with regards to the alleged lack of independence of the Board leading to arbitrary detention, inadmissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

7.8 The Committee notes the author's claims regarding articles 9 (1) and 10 (3) that he has exhausted "all reasonable domestic remedies" available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.9 Considering that the author's remaining claims are sufficiently substantiated for purposes of admissibility, the Committee declares them admissible as raising issues under articles 9(1) and 10 (3); of the Covenant, and proceeds to examine them on the merits.

#### *Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim under articles 9 (1) and 10 (3) of the Covenant that the State party failed to provide him with sufficient rehabilitative treatment before he first appeared before the Board, thus leading to arbitrary detention. The Committee recalls that it is the duty of the State party in cases of preventive detention to provide the necessary assistance that would allow detainees to be released as soon as possible without being a danger to the community.<sup>63</sup> The Committee notes the State party's position that the author has received an array of opportunities and services that work towards his rehabilitation (para 4.12). Particularly, the Committee notes that the author was offered participation in a Drug Treatment Unit Programme in January 2013, thus one year and three months before his first Board hearing and that he was offered to follow the same program a second time in February 2014 (para 4.2). The Committee also notes that he was then offered to complete an Alcohol and Other Drug Support Programme in October 2014 (para 4.3), and that, when the author would be able to eventually complete the Drug Treatment Unit Programme, he would be then considered suitable to attend the Adult Sex Offender Treatment Programme (paras 4.5, 4.6). The Committee also notes the assessment of the WGAD which considers that the author has been offered a fair chance of release by participating in treatment prior to the point at which his parole was first considered by the Board in April 2014, and continued to receive relevant treatment<sup>64</sup>. The Committee therefore considers that in the particular circumstances of this case, it is not in a position to find that the State party's failed to provide timely rehabilitation treatment prior to the author first appearing before the Board thus violating his rights under articles 9 (1) or 10 (3) of the Covenant.

8.3 The Committee also notes the author's allegation that his rehabilitation was not tailored to Māori people, and that they are overrepresented and discriminated in the criminal justice system. In view of the lack of specific individual information regarding this allegation as to how this affected the author individually, the Committee is not in position to determine a violation for this issue.

8.4 The Committee further notes the author's claims that his detention continued after the completion of the non-parole period of his imprisonment and that the conditions of his preventive detention were the same as the punitive part of his sentence. The Committee

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<sup>61</sup> *Rameka v. New Zealand* (CCPR/C/79/D/1090/2002), para. 7.4.

<sup>62</sup> *Isherwood v New Zealand A/HRC/WGAD/32/2016*, § 60-62.

<sup>63</sup> *Dean v. New Zealand*, (CCPR/C/D/1512/2006) § 7.5; *Carroll & Miller v New Zealand* (CCPR/C/121/D/2502/2014) §8.2

<sup>64</sup> *Isherwood v New Zealand A/HRC/WGAD/32/2016*, §57.

recalls its general comment No. 35, according to which “[a]n arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”<sup>65</sup> In the same comment, the Committee highlighted that preventive detention must be subjected to specific limitations in order to meet the requirements of article 9. Namely, preventive detention following a punitive term of imprisonment must, in order to avoid arbitrariness, be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention. States must only use such detention as a last resort, and must exercise caution and provide appropriate guarantees in evaluating future dangers. Moreover, detention conditions must “be distinct from the treatment of convicted prisoners serving a punitive sentence and be aimed at the detainees’ rehabilitation and reintegration into society.”<sup>66</sup> The Committee notes that the WGAD has concluded that in this case, the author’s preventive detention [was] sufficiently distinct from a punitive sentence because opportunities [were] being provided to him to access psychological and other care aimed at his rehabilitation and release,<sup>67</sup> and that there [were] compelling reasons “arising from the gravity of the crimes committed and the likelihood of the detainee’s committing similar crimes in the future” which justify Mr. Isherwood’s ongoing preventive detention.<sup>68</sup> Still, the Committee must make its own assessment, based on its jurisprudence and relevant subsequent developments in the case after the WGAD assessment, on whether the conditions, nature and length of the authors’ preventive detention were in line with the requirements of reasonableness, necessity, proportionality, and continued justification and independent review that are contained in general comment No. 35.

8.5 The Committee notes the author’ argument under article 9 of the Covenant that after serving his mandatory period of non-eligibility for parole, he was arbitrarily detained because there was no fresh evidence against him; he was not convicted of any additional offenses that could justify his continued preventive detention; and his punitive conditions of detention did not change. The Committee further notes the State party’s explanation that there was no need of any conviction, as the sentence of preventive detention was imposed lawfully on the author following his conviction in May 2004, for 5 offenses, including rape and sexual violation with a minor and that all sentences are administered according to the purpose of the Corrections Act 2004 and offenders sentenced to preventive detention are determined by security classification. The Committee also notes that the author was offered various forms of counselling and psychological care, with a Drug Treatment Unit Programme (DTU) which started in January 2013, before the author became eligible for parole. The Committee further notes the information of the State party according to which the author had to abandon the treatment in March 2014 as he recognised that his behaviour and health were a barrier to him engaging in the programme (para 4.2). The Committee also notes that the author became eligible for parole on 21 April 2014, and that the first Board hearing was held on 30 April 2014 (para 4.3); that the Board held further hearings on 21 April 2015 (para 4.4) and on 30 June 2016 (para 4.5) and concluded, after a risk assessment, that the author, as violent sexual offender, was still posing a very high risk; and that the Board allowed the transfer of the author to the low security unit at Christchurch Prison on 17 August 2017 (para 4.6). The Committee also notes that the author was later released on parole on 1 September 2020, after having completed the High Risk Personality Programme and the DTU Programme by 2018, and graduated from the Adult Sex Offender Treatment Programme in May 2019. The Committee therefore considers that the State party has sufficiently demonstrated that the author’s conditions, nature and length of his detention, as well as the security risk he posed of sexually violent offending, were duly assessed, in line with the requirements of

<sup>65</sup> General comment No. 35 on article 9 (liberty and security of person), CCPR/C/GC/35 (2014), para. 12.

<sup>66</sup> *Id.*, para. 21.

<sup>67</sup> *Isherwood v New Zealand A/HRC/WGAD/32/2016* §57.

<sup>68</sup> *Ibid.*, §47.

reasonableness, necessity, proportionality and continued justification contained in general comment No. 35.<sup>69</sup>

8.6 The Committee recalls that article 9 of the Covenant requires that preventive detention conditions be distinct from the conditions of convicted prisoners serving punitive sentences and be aimed at the detainee's rehabilitation and reintegration into society. In this regard, the Committee notes the State party's position that the purposes of the detention remain the same. It also notes that, while the detention remains officially punitive, the author's term of preventive detention has been sufficiently distinct from his terms of imprisonment during the punitive part of his sentence (prior to eligibility to parole) as it has been aimed at his rehabilitation and reintegration into society as required under articles 9 and 10 (3) of the Covenant. In light of the information before it, the Committee cannot conclude that the State party has not demonstrated that the author's preventive detention was sufficiently distinct from the punitive sentence.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation of articles 9 (1) and 10 (3) of the Covenant.

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<sup>69</sup> General comment No. 35 on article 9 (liberty and security of person), CCPR/C/GC/35 (2014), para. 12.

## Annex I

**Individual Opinion by Committee Member Gentian Zyberi (dissenting)**

1. While agreeing with the Committee's assessment concerning the rehabilitation efforts prior to the author first appearing before the parole Board on 30 April 2014,<sup>1</sup> I think that the inadequate rehabilitation and reintegration process during his prolonged preventive detention lasting almost 6,5 years violated his rights under articles 9 (1) and 10 (3) of the Covenant.

2. While the WGAD concluded in late August 2016 that this was not a case of arbitrary detention,<sup>2</sup> it must be noted that its decision was taken shortly after the non-parole period of the author's sentence was completed. Essentially, the main issue before the Committee was whether the conditions, nature and protracted length of the authors' preventive detention between April 2014 and September 2020, were in line with the requirements of reasonableness, necessity, proportionality, and continued justification and independent review that are contained in Committee's General Comment No. 35 and General Comment No. 21. General Comment No. 35 provides that "[a]n arrest or detention may be authorized by domestic law and nonetheless be arbitrary."<sup>3</sup> The Committee has highlighted that preventive detention following a punitive term of imprisonment must, in order to avoid arbitrariness, be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention. States must only use such detention as a last resort, and must exercise caution and provide appropriate guarantees in evaluating future dangers.<sup>4</sup> Moreover, detention conditions must "be distinct from the treatment of convicted prisoners serving a punitive sentence and be aimed at the detainees' rehabilitation and reintegration into society."<sup>5</sup>

3. As the length of preventive detention increases, the State party bears an increasingly heavy burden to justify continued detention and to show that the threat posed by the individual cannot be addressed by alternative measures.<sup>6</sup> As a result, a level of risk which might reasonably justify a short-term preventive detention, may not necessarily justify a longer period of preventive detention. The State party has failed to show that no other, less restrictive, means were available to achieve the aim of protecting the public from the author which would not require further extending his deprivation of liberty.

4. Article 9 of the Covenant requires that preventive detention conditions be distinct from the conditions of convicted prisoners serving punitive sentences and be aimed at the detainee's rehabilitation and reintegration into society. The State party has taken the position that the purposes of the detention remain the same. However, the detention remains punitive, regardless of whether an individual is serving the fixed or preventive detention portion of his or her sentence. While the author has long been offered various forms of counselling and psychological care, it does not seem that his Māori ethnicity or personal circumstances were adequately considered in the efforts to ensure his rehabilitation and reintegration into society.<sup>7</sup> Notably, he became eligible for parole in April 2014, but was transferred to the Self-Care Unit only in August 2017 and finally released on parole in September 2020. Based on the information available, the author's term of preventive detention has not been sufficiently distinct from his terms of imprisonment during the punitive part of his sentence (prior to

<sup>1</sup> See para. 8.2.

<sup>2</sup> *Isherwood v New Zealand*, A/HRC/WGAD/32/2016, para. 65.

<sup>3</sup> General Comment No. 35 on Article 9 (Liberty and Security of Person), CCPR/C/GC/35 (2014), para. 12.

<sup>4</sup> *Ibid.*, para. 21.

<sup>5</sup> *Ibid.*

<sup>6</sup> General Comment 35, para. 15: "the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention".

<sup>7</sup> See para. 3.9 and footnote 22 and paras. 5.6 and 5.7. See also General Comment 21 on Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (1992), paras. 10-12.

eligibility for parole), and has not been aimed, predominantly, at his rehabilitation and reintegration into society as required under articles 9 (1) and 10 (3) of the Covenant.

5. Under these circumstances, the Committee should have found a violation of articles 9 (1) and 10 (3) of the Covenant.



## Annex II

**Individual Opinion by Committee Member Arif Bulkan (dissenting)**

1. The Covenant imposes a continuing obligation in relation to all prisoners, namely that “reformation and social rehabilitation” shall comprise the “essential aim” of incarceration.<sup>1</sup> States parties are accordingly obliged to adopt “meaningful measures” for the reformation of all prisoners for the entire duration of their incarceration.<sup>2</sup> This enlightened approach is even more of an imperative in cases of preventive detention based on a notion of predicted dangerousness, a concept which this Committee has acknowledged to be “inherently problematic”.<sup>3</sup> Where the latter is imposed, States parties must provide the necessary assistance that would allow detainees to be released as soon as safely possible.<sup>4</sup>

2. In this case, a majority of the Committee accepts the response of the State party that the author was the beneficiary of an “array of opportunities and services that work towards his rehabilitation”, as recounted in paras 4.2 – 4.6 of these Views. Closer scrutiny, however, reveals that “array” is somewhat of an exaggeration. It was only in January 2013, 9 years into his sentence and just one year before he became eligible for parole, that the author was first enrolled in a drug treatment programme. The author did not complete it, as well as another one shortly before his first parole hearing the following year, so the denial of parole was inevitable.

3. Thereafter, the author spent 6 years in preventive detention, bringing the cumulative period of incarceration to 16 years. Over this time, the author was afforded a grand total of *two* brief sojourns in rehabilitation shortly before his first hearing and then two or three more thereafter. In my view, these sporadic attempts at rehabilitation hardly constitute “an array of opportunities”. They do not meet the standard laid down in article 10.3 of being meaningful, timely or continuous during his imprisonment, far less the heightened obligation required where a person is in preventive detention.

4. Further, this committee’s jurisprudence dictates that conditions in preventive detention must be distinct from those for convicted prisoners serving a punitive sentence and must be aimed at rehabilitation and reintegration.<sup>5</sup> Incarceration is also a last resort, where rehabilitation cannot be achieved by less intrusive means.<sup>6</sup> Here again, even though the State party admits that its legislation does not draw distinctions between punitive and non-punitive conditions in preventive detention, the majority acting on its own assessment and that of the Working Group has concluded that while the author’s detention remained officially punitive, it was sufficiently distinct being aimed at rehabilitation. This is yet another finding that I find difficult to accept. The information presented by both parties reveal that the author was in fact detained in the same conditions as those serving punitive parts of their sentence. Further, it would appear that the author did not receive any *specialised* treatment in light of his horrific childhood and the systemic problems<sup>7</sup> faced by those, like him, of Māori ethnicity.

6. Although the author does not cut a sympathetic figure, at the time of his conviction he was only 22 years old. Psychological reports available to the relevant authorities revealed a life of unimaginable torment. He was sexually abused as a child by several family members, who also initiated his addiction problems by giving him drugs to make him more compliant. Is it surprising that if a child is systematically drugged and abused that he will grow up to perpetrate acts of sexual violence? Or that he would self-sabotage when first exposed to

<sup>1</sup> ICCPR, §10(3).

<sup>2</sup> *Fardon v. Australia* (CCPR/C/98/D/1629/2007) §7.4.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Dean v New Zealand* (CCPR/C/D/1512/2006), §7.5.

<sup>5</sup> Human Rights Committee GC No. 35, CCPR/C/GC/35, 16 December 2014, paragraph 21; *Miller and Carroll v New Zealand* (CCPR/C/121/D/2502/2014) §8.6.

<sup>6</sup> *Fardon v. Australia* (CCPR/C/98/D/1629/2007) §7.4.

<sup>7</sup> Acknowledged by this Committee in its concluding observations on New Zealand’s 6th periodic report: CCPR/C/NZL/CO/6, § 26.

therapy after 9 years' imprisonment? The author was failed by family, community and the State in his formative years, and when he turned out exactly as moulded, the response was to lock him away in preventive detention.

7. I have no doubt that the State party is well-meaning and offers rehabilitation opportunities to prisoners. However, given the author's individual circumstances, I respectfully disagree that what was afforded to him was timely or adequate, or that the punitive nature of his incarceration was appropriately altered during the period of his preventive detention. For these reasons, I would find that he was the victim of a violation of articles 9(1) and 10(3) of the Covenant.

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