



**International Covenant on
Civil and Political Rights**

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Views

Communication No. 1635/2007

<u>Submitted by:</u>	Kenneth Davidson Tillman (represented by Eveline Jean Judith Crotty)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Australia
<u>Date of communication:</u>	9 October 2007 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 December 2007 (not issued in document form)
<u>Date of adoption of Views:</u>	18 March 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Preventive detention order after completion of initial prison sentence for sexual offences
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Arbitrary detention; prohibition of double jeopardy (<i>ne bis in idem</i>);
<i>Articles of the Covenant:</i>	9, paragraph 1; 14, paragraph 7
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 (b)

On 18 March 2010 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1635/2007.

[Annex]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (Ninety-eighth session)

concerning

Communication No. 1635/2007**

Submitted by: Kenneth Davidson Tillman (represented by Eveline Jean Judith Crotty)

Alleged victim: The author

State party: Australia

Date of communication: 9 October 2007 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 March 2010,

Having concluded its consideration of communication No. 1635/2007, submitted to the Human Rights Committee on behalf of Mr. Kenneth Davidson Tillman under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Kenneth Davidson Tillman, an Australian citizen, who was detained in New South Wales, Australia at the time of registration. The author claims to be a victim of a violation by Australia of articles 9, paragraph 1 and 14, paragraph 7, of the Covenant. The author is represented by Eveline Jean Judith Crotty, his religious visitor.

Factual background

2.1 On 6 March 1998, the author was convicted of two counts of sexual intercourse with a child under the age of ten years, and one count of attempted sexual intercourse with the same child. Both offences against the child were committed in July 1996. During the same

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

An individual opinion signed by Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina is appended to the present document.

proceedings, and covered by the conviction and sentence of 6 March 1998, the author also pleaded guilty to the common assault of a 15 year old girl, which he had committed on 19 April 1997. On 6 March 1998, the author was sentenced for these crimes to concurrent terms of 10 years imprisonment, commencing on 19 April 1997.

2.2 On 11 April 2007 (one week prior to the author's release from prison), the Attorney General of the State of New South Wales filed an application *ex officio*¹ under section 17 (1b)² of the *Crimes (Serious Sex Offenders) Act 2006 (New South Wales)* (CSSOA) requesting the author to be detained in prison for five years from the date of the order. In the alternative, the Attorney General requested that the author be subjected to extended supervision for five years.

2.3 On 17 April 2007, the Supreme Court of New South Wales granted an interim supervision order against the author pursuant to section 8 (1) of the CSSOA³. On 3 May 2007, the full court of the New South Wales Court of Appeal, overruled the order, and pursuant to section 16 (1) of the CSSOA⁴ ordered the author's detention for a period of 28 days. The interim detention order was renewed on 29 May 2007 for an additional 28 days. On 18 June 2007, the Supreme Court of New South Wales, held that the author should be detained in prison for one year, pursuant to section 17 (1) of the CSSOA⁵.

The complaint

3.1 With regard to the exhaustion of domestic remedies, the author claims that the constitutional validity of the Queensland equivalent to the CSSOA had been tested in the High Court of Australia in the judgment of *Fardon v Attorney General of Queensland*

¹ CSSOA Section 14: Application for continuing detention order

(1) The Attorney General may apply to the Supreme Court for a continuing detention order against a sex offender who, when the application is made, is in custody in a correctional centre: [it would appear that correctional centre refers to a prison facility].

- (a) while serving a sentence of imprisonment by way of full-time detention:
 - (i) for a serious sex offence, or
 - (ii) for an offence of sexual nature, or
- (b) pursuant to an existing continuing detention order,

(2) An application may not be made until the last 6 months of the offender's current custody.

² CSSOA Section 17: Determination of application for continuing detention order

- (1) The Supreme Court may determine an application under this Part for a continuing detention order:
- (a) by making an extended supervision order, or
 - (b) by making a continuing detention order, or
 - (c) by dismissing the application.

³ CSSOA Section 8: Interim supervision orders

(1) If, in proceedings on an application for an extended supervision order, it appears to the Supreme Court:

- (a) that the offender's current custody or supervision will expire before the proceedings are determined, and
- (b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extended supervision order, the Supreme Court may make an order for the interim supervision of the offender.

⁴ CSSOA Section 16: Interim detention orders

(1) If, in proceedings on an application under this Part for a continuing detention order, it appears to the Supreme Court:

- (a) that the offender's current custody (if any) will expire before the proceedings are determined, and
 - (b) that the matters alleged in the supporting documentation would, if proved, justify the making of a continuing detention order or extended supervision order,
- the Supreme Court may make an order for the interim detention of the offender.

⁵ See FN 1.

(2004). According to the author, in *Fardon*, the High Court of Australia confirmed the validity of the Queensland act and dismissed an appeal brought on a number of grounds, including that the Queensland act authorized double punishment. The author therefore submits that domestic remedies would have no real prospect of success and need not be exhausted.

3.2 The author submits that his re-imprisonment pursuant to the CSSOA was imposed by civil proceedings which failed to apply the procedures required for a criminal trial. The absence of any further determination of guilt amounts to double punishment and also undermines the essence of the principle that deprivation of liberty must not be arbitrary.

3.3 The author claims to be a victim of a violation of article 14, paragraph 7 of the Covenant because his imprisonment based on the CSSOA imposes double punishment without further determination of criminal guilt. It is also based on the prior offence and not on whether a new crime has been committed. The author further claims that he is subjected to the same regime of imprisonment as if convicted without having been charged, tried, or convicted of a criminal offence and his status remains that of a prisoner. The author refers to the conclusions by a minority of the Committee in communication No. 1090/2002, *Rameka et al. v. New Zealand*⁶ and underlines that their conclusions lend further weight to the assertion that the CSSOA is a breach of article 14, paragraph 7, in particular in the absence of any indication that the preventive element was contemplated at the time of sentencing.

3.4 The author further claims to be a victim of a violation of article 9, paragraph 1, of the Covenant. He submits that his detention was ordered on grounds and in accordance with such procedures as established by law. He recalls the Committee's jurisprudence that, to avoid a characterization of arbitrariness, detention must be reasonable, necessary in all the circumstances of the case and proportionate to achieving the legitimate aims of the State party. If the State party may achieve its legitimate ends by less invasive means than detention, detention will be rendered arbitrary⁷.

3.5 The author claims that the very nature of the right to be free from arbitrary detention justifies close scrutiny of any legislative instrument that imposes a limitation on the enjoyment of that right. The author accepts that appropriate measures for care and treatment of offenders after their release from prison is a legitimate objective, as set out in section 3 of the CSSOA⁸ but disputes the legitimacy of re-imprisonment to achieve these objectives. The author further disputes the rationale behind imprisonment for an indefinite term and the object of rehabilitation of an offender. He further submits that the State party has not demonstrated why it is unable to establish alternative facilities that can appropriately meet

⁶ See Communication No. 1090/2002, *Rameka et al. v. New Zealand*, views adopted on 15 December 2003, minority opinion.

⁷ See Communications No. 560/1993, *A. v. Australia*, views adopted on 3 April 1997, para. 9.2 and 9.4; No. 900/1999, *C. v. Australia*, views adopted on 28 October 2002, para. 8.2; No. 1014/2001, *Baban v. Australia*, views adopted on 6 August 2003, para. 7.2; 1050/2002, *D. v. Australia*, views adopted on 11 July 2006, para. 7.2; 1069/2002, *Bakhtiyar v. Australia*, views adopted on 29 October 2003, 9.2 and 9.4, 1128/2002, *de Morais v. Angola*, views adopted on 29 March 2005, para. 6.1, 1085/2002, *Taright v. Algeria*, views adopted on 15 March 2006, para. 8.3, 1324/2004, *Shafiq v. Australia*, views adopted on 31 October 2006.

⁸ CSSOA Section 3: Objects of the Act:

The objects of this Act are to provide for the extended supervision and continuing detention of serious sex offenders so as:

(a) to ensure the safety and protection of the community, and
(b) to facilitate the rehabilitation of serious sex offenders.

the same objectives and why imprisonment is the only means possible for achieving these aims.

3.6 The author distinguishes his case from the facts of Communication No. 1090/2002, *Rameka et al. v. New Zealand* as the preventive element in the present case was not included in the original sentence. He explains that in his case, the application for and the imposition of preventive sentence occurred after he had served his original sentence and therefore constituted arbitrary detention, in breach of article 9, paragraph 1.

3.7 The author submits that detention in prison is a form of punishment and does not cease to be punishment by characterizing its purpose as non-punitive. He underlines that his imprisonment cannot be justified on the basis of the necessity to protect public order, as he has not been charged or convicted of any crime while he has been in prison. Nor has he been diagnosed with any mental illness that might justify his detention.

State party's observations on admissibility and merits

4.1 The State party submits its observations on admissibility and merits dated on 8 September 2008. As to the facts, it submits that on 7 April 2008, based on a notice of motion by the State of New South Wales, un contested by the author, the Supreme Court of New South Wales extended the detention order, pursuant to section 19 (1) of the CSSOA⁹ to expire on 31 October 2008. The author is participating in the Custody-Based Intensive Treatment (CUBIT) programme, which he is to complete in early October 2008. On 15 July 2008, the author was charged with further sexual offences and was therefore refused bail. Furthermore, the author's custody under the continuing detention order was suspended, while the expiry date of the order remains at 31 October 2008.

4.2 The State party submits that the communication should be declared inadmissible under article 2 and 5, paragraph 2 (b), of the Optional Protocol. The State party maintains that the author failed to exhaust all available domestic remedies because he neither sought leave to appeal to the High Court of Australia nor a writ of habeas corpus invoking the original jurisdiction of the High Court by questioning the constitutionality of the CSSOA. A successful application to the High Court could have overturned or remitted for further consideration the continuing detention order. The State party submits that the facts and some of the legislative provisions in the case of *Fardon v. Attorney-General* before the High Court were different.¹⁰ It further highlights that the author has not offered prima facie evidence that these remedies are ineffective or that an application for review would inevitably be dismissed because of legal precedent.

4.3 On the merits, the State party submits that the author's detention occurred in accordance with procedures established by the CSSOA, and that the majority of the High Court found that legislation created in the same way in Queensland was constitutionally valid. It recalls the Committee's jurisprudence according to which preventive detention of persons for reasons of public security is not arbitrary per se¹¹. The State party maintains

⁹ CSSOA Section 19: Detention order may be varied or revoked

(1) The Supreme Court may at any time vary or revoke a continuing detention order or interim detention order on the application of the State of New South Wales or the offender.

(2) For the purpose of ascertaining whether to make such an application in relation to a continuing detention order, the Commissioner of Corrective Services must provide the Attorney General with a report on the offender at intervals of not more than 12 months.

¹⁰ *Fardon v. Attorney General (Qld)*(2004) 223 CLR575 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Hayne JJ, Kirby J dissenting).

¹¹ General Comment No. 8 (16), adopted on 28 July 1982, para. 4; Communication No. 1090/2002, *Rameka et al. v. New Zealand*, views adopted on 15 December 2003.

that the author's detention order of 18 June 2007 was ordered by the New South Wales Supreme Court, an independent judicial body, after a full hearing in accordance with the common law principles of fair trial. It underlines that in the case of *Fardon*, the High Court found that the Queensland Supreme Court fulfilled its role as a judicial body in determining a similar application for continuing detention under the parallel Queensland legislation.

4.4 With regard to the necessity to remove the author from the community for public safety, the State party submits that the CSSOA establishes a stringent test to be applied by the Court before an order can be issued. The Court must be satisfied to a high degree of probability that the offender is likely to commit a further serious sexual offence. For that purpose, it must take into consideration the safety of the community, psychiatric reports, including those relating to the likelihood of recidivism, the offender's willingness to participate in rehabilitation programs and any pattern of offending behaviour. The State party further submits that supervised release was not appropriate in the author's case for reasons of safety of the community and his own protection. Continued detention further provides the best support services specifically designed for repeat sexual offenders, including counselling with a therapist trained in the treatment of sexual offenders and rehabilitation programs. The author had refused to participate in the CUBIT programme during his initial prison sentence, but continued to participate in that program during his current imprisonment on remand in relation to different alleged sexual offences. The State party thus submits that returning the author to detention in a prison facility where he had access to rehabilitation programmes, was reasonably proportionate to the rehabilitative objectives of the CSSOA, it further satisfies the principles of natural justice and periodic independent review.

4.5 The State party submits further that a preventive detention under the CSSOA is a purely civil proceeding and does not involve the examination of a commission of a criminal offence. The author's criminal history and the criminal elements of the offence were not the basis of the order for continuing detention under section 17 of the CSSOA.¹² The State party maintains that the CSSOA allows continuing detention orders for the non-punitive purpose of protection of the public. It further argues that the author had access to the best available rehabilitative resources and facilities within the prison system, which enabled the State party to achieve the dual goals of ensuring the safety of the community and the rehabilitation of the author. The New South Wales Supreme Court motivated its continuing detention order by the fact that the CUBIT programme was not available outside the prison system and it linked the term of the author's continuing detention to the time taken to successfully complete the CUBIT rehabilitation programme. The State party thus submits that the author's continuing detention did not constitute double punishment within the meaning of article 14, paragraph 7, because it did not relate to the same offence and his further detention did not have a punitive character.

Author's comments on the State party's observations

5.1 The author contends the State party's additions on the facts and highlights that he has not been tried or convicted for any crime since he completed a prison sentence on 18 April 2004 for a crime for which he was convicted in 1998. He underlines that his communication relates to the proceedings which took place on 17 April, 3 May, 29 May and 18 June 2007 after completing his initial sentence

¹² *Oliveira v. Switzerland*, 25711/94 [1998] ECHR 68 (30 July 1998): successive prosecutions will not violate the rule against double jeopardy if they relate to separate offences arising out of the same conduct; *Uner v. Netherlands* [2005] ECHR 46410/99 (16 June 2005), para. 53: the distinction was made between criminal and administrative proceedings arising from the same factual circumstances.

5.2 With regard to the exhaustion of domestic remedies, the author maintains that there is no doubt about the effectiveness of the domestic remedies but his prospect of a favourable appeal to the High Court is nil. Recalling the Committee's jurisprudence, the author maintains that if a court has already substantially decided the question at issue, the complainant need not pursue a national judicial remedy.¹³ He underlines that the CSSOA was enacted after the decision by the High Court in *Fardon* and it relied on that decision as a precedent. The author submits further that he was advised by a Senior Counsel and Law Professor not to appeal to the High Court for lack of objective prospects of success. Considering that the CSSOA and the Dangerous Prisoners (Sexual Offenders) Act considered in *Fardon* have the same substantive effect – imprisonment without a criminal trial on the basis of a prediction of risk to the community – the appeal to the High Court was objectively ineffective. The author further recalls the Committee's jurisprudence according to which a reasonable perspective that remedies would be ineffective is sufficient to demonstrate exhaustion¹⁴, for instance where it is unlikely that settled jurisprudence of the highest court would be overturned on appeal,¹⁵ or where under applicable domestic laws, the claim would inevitably be dismissed¹⁶.

5.3 The author submits that the double punishment effect of the CSSOA is reinforced by the fact that the Supreme Court is required to have regard to the prior offences of a person in determining whether a continuing detention order is issued. He further argues that his continued imprisonment amounted to punishment, as he was subject to the same imprisonment regime as if he were convicted of a criminal offence. He compares his situation to that of *Fardon* where the High Court held that the Dangerous Prisoners (Sexual Offenders) Act (Queensland) did not inflict punishment at all; in spite of Mr. Fardon's continued imprisonment after the conclusion of his initial sentence.

5.4 The author argues that his case differs fundamentally from other cases decided by the Committee¹⁷ and the European Court of Human Rights¹⁸, in which a preventive element was imposed at the time of sentencing. The imposition of the author's continuing detention order after having served his original sentence constitutes a breach of the prohibition of double punishment. His re-imprisonment was independent of the initial criminal trial and after completion of the finite sentence, without finding any new grounds of guilt. The author argues that detention based solely on potential dangerousness offers authorities a way to evade the constraints of article 14.

5.5 The author reiterates that he neither disputes the lawfulness of his continuing detention order, nor the legitimacy of the legislative objective to protect the community from harm. He disputes the utilization of re-imprisonment to achieve the objectives of the

¹³ Communication No. 24/1977, *Lovelace v. Canada*, views adopted on 30 July 1981.

¹⁴ See Communications No. 10/1977, *Altesor v. Uruguay*, views adopted on 29 March 1982; No. 437/1990, *Patiño v. Panama*, inadmissibility decision adopted on 21 October 1994; No. 438/1990, *Thompson v. Panama*, inadmissibility decision adopted on 21 October 1994; No. 356/1989, *Collins v. Jamaica*, views adopted on 25 March 1993; 146/1983 and 148-154/1983, *Baboream et al. v. Suriname*, views adopted on 4 April 1984.

¹⁵ See Communications No. 511/1992, *Länsman et al. v. Finland*, views adopted on 14 October 1993, para. 6.3, 1095/2002, *Gomaritz v. Spain*, views adopted on 26 August 2005, para. 6.4, 1101/2002, *Alba Cabriada v. Spain*, views adopted on 3 November 2004, para. 6.5.

¹⁶ Communication No. 327/1988, *Barzhig v. France*, views adopted on 11 April 1991, para. 5.1.

¹⁷ See Communication No. 1090/2002, *Rameka et al. v. New Zealand*, views adopted on 6 November 2003.

¹⁸ *Mansell v United Kingdom*, Application No. 32072/96, Unreported, ECHR, 2 July 1997, as cited in *Giles* [2004] 1 AC 1; *Winterwerp v. The Netherlands*, (1979), 33 ECHR, ser A, 4, 2 EHRR 387; *De Wilde, Oms and Versyp v. Belgium*, (1971) 12 ECHR, ser. A,6, 1 EHRR 373; *Iribarne Pérez v. France*, (1995) 325 ECHR, ser A, 48, 22 EHRR 153.

CSSOA, in particular the objective of rehabilitation. He claims that rehabilitation can only be tested when a person has (some) liberty.¹⁹ He maintains that imprisonment is not necessary to achieve the legitimate objective of rehabilitation of a person in the interest of the protection of the community, which could be achieved by psychiatric and psychological services in a community setting which balances the safety of the community with the rehabilitative needs of the former offender. He submits that the CSSOA inflicts arbitrary detention contrary to article 9, paragraph 1, of the Covenant because it inflicts imprisonment on the basis of what a person might do rather than on what a person has done.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee has noted the State party's objection to the admissibility of the author's communication for failure to bring his case before the Australian High Court, either by seeking leave to appeal or by submitting a writ of habeas corpus. It also notes the author's argument that the CSSOA was enacted after the High Court decision in *Fardon*, in which the High Court decided that a continuing detention order, based on the Dangerous Prisoners (Sexual Offenders) Act (Queensland), the Queensland equivalent to the CSSOA was constitutional. The Committee further observes that the State party itself refers to the constitutional validity of the CSSOA based on the *Fardon* High Court decision (see 4.3). The Committee recalls its jurisprudence²⁰ according to which, for the purposes of the Optional Protocol, an author is not required to exhaust domestic remedies, if the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts. The Committee therefore concludes that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

6.4 In the Committee's view, the author has sufficiently substantiated, for purposes of admissibility the claims under articles 9, paragraph 1, and 14, paragraph 7, of the Covenant and therefore proceeds to their examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

¹⁹ See A. Carroll, M. Lyall and A. Forrester, Clinical Hopes and Public Fears in Forensic Mental Health, (2004) 15(3), *The Journal of Forensic Psychiatry and Psychology* 407, 411.

²⁰ See for example Communication No. 1533/2006, Zdenek Ondracka and Milada Ondracka v. Czech Republic, views adopted on 31 October 2007, para. 6.3; Communication No. 1095/2002, Bernardino Gomariz Valera v. Spain, views adopted on 22 July 2005, para. 6.4, Communication No. 511/1992, Länsmän et al. v. Finland, views adopted on 14 October 1993, para. 6.3.

7.2 The Committee notes the State party's observations that the majority of its High Court had found that legislation created the same way as the DPSOA in Queensland was constitutional. It further notes the State party's explanation that proceedings under the CSSOA are of civil nature and that the author's detention had a preventive character. The Committee has also noted the author's claim that his detention under the CSSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes that the author's claim that he was detained under the same prison regime as for his initial prison term.

7.3 The Committee observes that article 9, paragraph 1 of the Covenant recognises for everyone the right to liberty and the security of his person and that no-one may be subjected to arbitrary arrest or detention. The article, however, provides for certain permissible limitations on this right, by way of detention, where the grounds and the procedures for doing so are established by law. Such limitations are indeed permissible and exist in most countries in laws which have for object, for example, immigration control or the institutionalised care of persons suffering from mental illness or other conditions harmful to themselves or society. However, limitations as part of, or consequent upon, punishment for criminal offences may give rise to particular difficulties. In the view of the Committee, in these cases, the formal prescription of the grounds and procedures in a law which is envisaged to render these limitations permissible is not sufficient if the grounds and the procedures so prescribed are themselves either arbitrary or unreasonably or unnecessarily destructive of the right itself.

7.4 The question presently before the Committee is whether, in their application to the author, the provisions of the CSSOA under which the author continued to be detained at the conclusion of his 10-year term of imprisonment were arbitrary. The Committee has come to the conclusion that they were arbitrary and, consequently, in violation of Article 9, paragraph 1, of the Covenant, for a number of reasons, each of which would, by itself, constitute a violation. The most significant of these reasons are the following:

(1) The author had already served his 10 year term of imprisonment and yet he continued, in actual fact, to be subjected to imprisonment in pursuance of a law which characterises his continued incarceration under the same prison regime as detention. This purported detention amounted, in substance, to a fresh term of imprisonment which, unlike detention proper, is not permissible in the absence of a conviction for which imprisonment is a sentence prescribed by law.

(2) Imprisonment is penal in character. It can only be imposed on conviction for an offence in the same proceedings in which the offence is tried. The author's further term of imprisonment was the result of Court orders made, some 10 years after his conviction and sentence, in respect of predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence. This new sentence was the result of fresh proceedings, though nominally characterised as "civil proceedings", and fall within the prohibition of Article 15, paragraph 1, of the Covenant. In this regard, the Committee further observes that, since the CSSOA was enacted in 2006 shortly before the expiry of the author's sentence for an offence for which he had been convicted in 1998 and which became an essential element in the Court orders for his continued incarceration, the CSSOA was being retroactively applied to the author. This also falls within the prohibition of article 15, paragraph 1, of the Covenant, in that he has been subjected to a heavier penalty "than was applicable at the time when the criminal offence was committed". The Committee therefore considers that detention pursuant to proceedings incompatible with article 15 is necessarily arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

(3) The CSSOA prescribed a particular procedure to obtain the relevant Court orders. This particular procedure, as the State party conceded, was designed to be civil in

character. It did not, therefore, meet the due process guarantees required under article 14 of the Covenant for a fair trial in which a penal sentence is imposed.

(4) The “detention” of the author as a “prisoner” under the CSSOA was ordered because it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation. The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science. The CSSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise. To avoid arbitrariness, in these circumstances, the State party should have demonstrated that the author’s rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State party had a continuing obligation under article 10, paragraph 3, of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 10 years during which he was in prison.

7.5 In light of the preceding findings, the Committee does not consider it necessary to examine the matter separately under article 14, paragraph 7, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 9, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including termination of his detention under the CSSOA

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion of Committee members Mr. Krister Thelin and Ms. Zonke Zanele Majodina

Committee member Mr. Krister Thelin, with whom Ms. Zonke Zanele Majodina associated herself, was of a different view and stated:

“The majority has found a violation in this case. I respectfully disagree. The Committee’s views should in its reasoning and conclusions read as follows:

7.1 With regard to the author’s claim that his detention under the CSSOA was arbitrary, the Committee recalls its jurisprudence establishing that detention for preventive purposes must be justified by compelling reasons and reviewable periodically by an independent body¹. The Committee notes that the author was preventively detained from 17 April 2007 to 31 October 2008 and that his preventive detention was based on grounds and procedures established by law – the CSSOA –, and reviewed periodically by an independent judicial body, i.e. the New South Wales Supreme Court. It further notes that the author had refused to participate in the CUBIT programme during his initial prison sentence and that the programme was not available outside the prison system. It also notes that the two purposes of the CSSOA are public safety and the rehabilitation of a sexual offender. Nevertheless, to avoid arbitrariness, the author’s preventive detention must have been reasonable, necessary in all circumstances of the case and proportionate to achieving the legitimate aims of the State party. The Committee observes that the author’s case was thoroughly and repeatedly reviewed by the State party’s New South Wales Supreme Court and also upheld on appeal, that the preconditions as set out in the CSSOA were, according to the judicial review, met and that the author’s refusal to participate in the CUBIT rehabilitation programme during his initial sentence contributed to the assessment that he may pose a serious danger to the community². In light of the circumstances of the case, the Committee therefore concludes that the author’s preventive detention was not disproportionate to the legitimate aim of the applicable law and did not, in this or any other respect, constitute a violation of article 9, paragraph 1, of the Covenant.

7.2 The Committee has noted the author’s claim that his detention under the CSSOA imposes double punishment without further determination of criminal guilt and that the court failed to include any order for preventive reasons in the initial sentence. It also notes his claim that he was detained under the same prison regime as for his initial prison sentence. The Committee notes the State party’s observations that the detention order under the CSSOA was not based on the author’s criminal history and did not relate to the author’s initial offence. It further notes the State party’s explanation that proceedings under the CSSOA are of a civil nature and that the author’s detention had a preventive character.

7.3 The Committee recalls its General Comment No. 32³, according to which a person, once convicted or acquitted of a certain offence, cannot be brought before the same court again or before another tribunal for the same offence. The guarantee, however, only applies

¹ Communication No. 1090/2002, *Rameka et al. v. New Zealand*, views adopted on 6 November 2003, para. 7.3; Communication No. 1385/2005, *Benjamin Manuel v. New Zealand*, views adopted on 18 October 2007, para. 7.2-7.3; Communication No. 1512/2006, *Allan Kendrick Dean v. New Zealand*, views adopted on 17 March 2009, para. 7.4.

² See Communication No. 1512/2006, *Allan Kendrick Dean v. New Zealand*, views adopted on 17 March 2009, para. 7.5.

³ See CCPR/C/GC/32, para. 54.

to criminal offences and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant⁴. The Committee has noted the State party's contention that the civil proceedings under the CSSOA do not fall within the remit of article 14 of the Covenant. It recalls, however, General Comment No. 32 and its jurisprudence to the effect that the criminal nature of a sanction may be extended to acts that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity⁵. The Committee observes that despite the preventive purposes of protection of public safety and rehabilitation of a sexual offender envisaged in the CSSOA, and the legal qualification of the CSSOA as civil proceedings, the severity of the measure – continued imprisonment subject to review upon request – must be regarded as being of criminal nature.

7.4 The Committee must therefore determine if the penal sanction under the CSSOA was based on the same offence as the author's initial sentence. The Committee recalls that the Covenant does not limit the State party's capacity to authorize an indefinite sentence with a preventive component⁶. The basis of the assessment for the author's preventive detention, which was decided separately from the initial sentencing, was, as found by the courts, his serious danger to the community. The Committee concludes that the preventive detention was not imposed on the same grounds as his previous offence but for legitimate protective purposes. It therefore holds that the author's preventive detention did not constitute a violation of the principle *ne bis in idem* according to article 14, paragraph 7, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is consequently of the view that the facts before it do not reveal a violation of any of the provisions of the International Covenant on Civil and Political Rights.”

[Signed] Mr. Krister Thelin

[Signed] Ms. Zonke Zanele Majodina

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

⁴ See Communication No. 1001/2001, *Gerardus Strik v. The Netherlands*, inadmissibility decision of 1 November 2002, para. 7.3.

⁵ See CCPR/C/GC/32, para. 15, *Perterer v. Austria*, views adopted on 20 July 2004, para. 9.2.

⁶ Communication No. 1090/2002, *Rameka et al. v. New Zealand*, views adopted on 6 November 2003, para. 7.2.