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Seventy-ninth session
20 October - 7 November 2003

VIEWS

Communication No. 1090/2002

Submitted by:	Mr. Tai Wairiki Rameka et al. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The authors
State party:	New Zealand
Date of communication:	9 March 2002 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 12 July 2002 (not issued in document form)
Date of adoption of Views:	6 November 2003

On 6 November 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1090/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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

Seventy-ninth session

concerning

Communication No. 1090/2002[*]

Submitted by:	Mr. Tai Wairiki Rameka et al. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The authors
State party:	New Zealand
Date of communication:	9 March 2002 (initial submission)

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

Meeting on 6 November 2003,

Having concluded its consideration of communication No. 1090/2002, submitted to the Human Rights Committee by Mr. Tai Wairiki Rameka et al. 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 authors of the communication, and the State party,

Adopts the following:

[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The texts of individual opinions signed by Committee members Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski are appended to the present document.

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

1. The authors of the communication, dated 9 March 2002, are Messrs. Tai Wairiki Rameka, Anthony James Harris and Tai Rangi Tarawa, all New Zealand nationals currently detained serving criminal sentences. They claim to be victims of violations by New Zealand of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant. They are represented by counsel.

The facts as presented by the authors

Mr. Rameka's case

2.1 On 29 March 1996, Mr. Rameka was found guilty in the High Court at Napier of two charges of sexual violation by rape, one charge of aggravated burglary, one charge of assault with intent to commit rape, and indecent assault. Pre-sentence and psychiatric reports provided to the court referred inter alia to the author's previous sexual offences, his propensity to commit sexual offences, his lack of remorse and his use of violence, concluding that that there was a 20% likelihood of further commission of sexual offences.

2.2 In respect of the first charge of rape, he was sentenced to preventive detention (that is, indefinite detention until release by the Parole Board) under section 75 of the Criminal Justice Act 1985,[1] concurrently to 14 years' imprisonment in respect of the second charge of

[1] Sections 75, 77 and 89 *Criminal Justice* Act 1985 provide as follows:-

75 Sentence of preventive detention

"(1) This section shall apply to any person who is not less than 21 years of age, and who either-

(a) is convicted of an offence against section 128 (1) [sexual violation] of the Crimes Act 1961; or

(b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.

(2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention. …

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court-

(a) Has first obtained a psychiatric report on the offender; and

(b) Having regard to that report and any other relevant report,-

Is satisfied that there is a substantial risk that the offender will commit a specified offence upon release."

77 Period of preventive detention indefinite

"An offender who is sentenced to preventive detention shall be detained until released on the direction of the Parole Board in accordance with this Act."

89 Discretionary release on parole

"(1) Subject to subsection (2) of this section, an offender who is subject to an indeterminate sentence is eligible to be released on parole after the expiry of 10 years of that sentence."

rape, to two years' imprisonment in respect of the aggravated burglary and to two years' imprisonment for the assault with intent to commit rape. He was convicted and discharged in respect of the remaining indecent assault charge, as the sentencing judge viewed it as included in the other matters dealt with. He appealed against the sentence of preventive detention as being both manifestly excessive and inappropriate, and against the sentence of 14 years' imprisonment for rape as being manifestly excessive.

2.3 On 18 June 1997, the Court of Appeal dismissed the appeal, finding that the sentencing judge was entitled to conclude, on the evidence, that there was a "substantial risk" that Mr. Rameka would offend again in an aggressive and violent manner upon release, and that there was "a high level of future dangerousness" from which the community had to be protected. The Court supported its conclusion by reference to Mr. Rameka's repeated use of a knife and violence in the context of sex-related offences, and his lengthy detention of his victim in each instance. It also found, with respect to the sentence for rape, that the 14 year term of imprisonment was "well within" the discretion of the sentencing judge.

Mr. Harris' case

2.4 On 12 May 2000, Mr. Harris was found guilty by the High Court at Auckland, following pleas of guilty, of 11 counts of sexual offences occurring over a period of 3 months against a boy who turned 12 during the period in question. They comprised two charges of sexual violation involving oral genital contact and nine charges of indecent assault or inducing indecent acts in respect of a boy under 12. He had previously been convicted of two charges of unlawful sexual connection with a male under 16 and one of indecently assaulting a male under 12, all in respect of an 11 year old boy. On the two unlawful sexual connection counts, he was sentenced to six years' imprisonment, and concurrently to four years' on the remaining counts.

2.5 The Solicitor-General, for the Crown, sought leave to appeal on the basis that preventive detention, or at least a longer finite sentence, should have been imposed. On 27 June 2000, the Court of Appeal agreed, and substituted a sentence of preventive detention in respect of each count. The Court referred to the warning of serious consequences given by the court sentencing the author for his previous offences, his failure to amend his behaviour following a sexual offenders' course in prison, the features of breach of a child's trust in offending, the failure to heed police warnings provided to the author against illicit contact with the child victim, as well as the comprehensive psychiatric report defining him as a homosexual paedophile attracted to pre-pubescent boys and the risk factors analysed in the report. While observing that the case would warrant a finite sentence of "not less" than seven and a half years, the Court however concluded, in the circumstances, that no appropriate finite sentence would adequately protect the public, and that preventive detention, with its features of continuing supervision after release and amenability to recall, was the appropriate sentence.

Mr. Tarawa's case

2.6 On 2 July 1999, Mr. Tarawa was found guilty of sexual violation by rape, two charges of sexual violation by unlawful sexual connection, indecent assault, burglary, two charges of aggravated burglary, two charges of kidnapping, being an accessory after the fact, three charges of aggravated robbery, demanding with menaces, and unlawfully entering a building. Previously, he had committed multiple offences in three earlier incidents, involving breaking

into homes and engaging in sexually-motivated violence, including two rapes. Subsequently, he committed further burglary and assault. The sentencing judge found a consistent pattern of predatory conduct, planned and executed with professionalism, exacerbated by the fact that some offences were committed while on bail. After considering the nature of the offending, its gravity and timespan, the nature of the victims, the response to previous rehabilitative efforts, the time since previous offending, the steps taken to avoid re-offending, the (non-)acceptance of responsibility, the pre-sentence report, the psychological report and the psychiatric assessment of a very high risk of re-offending along with the relevant risk factors, the judge sentenced him to preventive detention in respect of the three sexual violation charges, and encouraged him to make use of the counseling and rehabilitative services available in prison. He was concurrently sentenced to 4 years' imprisonment on the aggravated burglary charge, 6 years for the kidnapping, 3 years for demanding with menaces, 3 years for aggravated burglary and aggravated robbery, 18 months for burglary and being an accessory after the fact, 6 years for a further kidnapping and 5 years for a further aggravated robbery, 6 months for indecent assault and 9 months for unlawful entry.

2.7 On 20 July 2000, the Court of Appeal, examining the appeal on the basis of the author's written submissions, considered the pattern of circumstances of each set of offences and found, on the entire background of the appellant, his unsuccessful rehabilitation efforts as well as the pre-sentence, psychiatric and psychological reports, that the conclusions of substantial risk requiring the protection of the public were open to the sentencing judge, who had properly weighed the available alternatives of finite sentences.

2.8 On 19 September 2001, the Judicial Committee of the Privy Council rejected all three authors' applications for special leave to appeal.

The complaint

3.1 The authors complain, firstly, that the leading case of R v Leitch,[2] where a Full Court of the Court of Appeal laid out the principles applicable to sentences of preventive detention, was wrongly decided. The authors contend that this decision does not offer meaningful guidance as to how the courts should determine the existence of "substantial risk" of a future offence. In the authors view, this element should be demonstrated to the criminal level of proof beyond all reasonable doubt, as applied by Canadian courts in the context of preventive detention. They further contend that the elements set out in section 75(2) of the Criminal Justice Act are excessively vague and arbitrary.[3] They argue in addition that the Leitch decision wrongly analyses "expedient for the protection of the public" and incorrectly overruled the previous jurisprudence of the "last resort test". They contend that the Court did not analyse arguments in that case that preventive detention was inconsistent with the Covenant.

3.2 Secondly, the authors contend that it was arbitrary to impose a discretionary sentence on the basis of evidence of future dangerousness, as such a conclusion cannot satisfy the statutory tests of "substantial risk of re-offending" or "expedient for the protection of the public" in the individual case. They point to several writers who caution about the difficulties

[2] [1998] 1 NZLR 420.
[3] See footnote 1, *supra.*

of predicting of future criminal behaviour and relying on statistical classes and patterns.[4] In any event, they argue that on the facts none of them fit the statutory tests of being a "substantial risk", or that preventive detention was "expedient for protection of the public".

3.3 Thirdly, the authors argue that they were sentenced without regard being paid, by the sentencing court or on appeal, to issues of (i) arbitrary detention, in terms of article 10, paragraphs 1 and 3, of the Covenant, ss. 9 and 23(5) of the New Zealand Bill of Rights Act 1990, the Magna Carta, and or the Bill of Rights 1689 (Imp.); (ii) presumption of innocence, in terms of articles 9 and/or 14, paragraph 2, of the Covenant, as interpreted by the Committee, (iii) (the alleged absence of sufficient) periodic review of an indeterminate sentence, in terms of article 9, paragraph 4, of the Covenant and (iv) cruel, unusual, inhuman or degrading punishment under article 7 of the Covenant or the Bill of Rights 1689.

3.4 As to the issue of arbitrary detention, the authors argue that there is insufficient regular review of their future "dangerousness", and that they are effectively being sentenced for what they might do when released, rather than what they have done. The authors refer to jurisprudence of the European Court of Human Rights[5] and academic writings[6] in support of the proposition that a detainee has the right to have renewed or ongoing detention that is imposed for preventive or protective purposes to be tested by an independent body with judicial character. The authors observe that under the State party's scheme, there is no possibility for release until ten years have passed and the Parole Board may consider the case. Concerning the presumption of innocence, the authors contend that preventive detention should be seen as a punishment for crimes which have not yet been, and which may never be, committed, and thus in breach of article 14, paragraph 2.

3.5 In respect of the above two issues, the authors also refer to concerns expressed by the Committee upon its consideration of the State party's third periodic report, concerning the compatibility of the scheme of preventive detention with articles 9 and 14.[7]

3.6 As to issues under articles 7 and 10, the authors argue that due to the 10 year non-parole period applicable to their sentences, potential treatments of sexual offenders aimed at reducing their risk and dangerousness are not made available until close to the expiry of the 10 year period. They also appear to object, in general, to the 10 year non-parole period. This fails to treat persons so sentenced with humanity and dignity, as required by article 10,

[4] Cobley: *Sex Offenders: Law, Policy and Practice* (Jordans, Bristol, 2000) at 196; Brown & Pratt: *Dangerous Offenders, Punishment & Social Order* (Routledge, London, 2000) at 82 and 93.

[5] The authors cite Van Droogenboeck v Belgium (1982) 4 EHRR 443 (administrative detention 'at the Government's disposal' following a two year sentence for theft) and Weeks v United Kingdom (1988) 10 EHRR 293 (discretionary life sentence for armed robbery with release on licence when no longer a threat).

[6] The authors cite Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (Butterworth's, London, 1995) at 108-9, 146, 151-152 and 154, and Wachenfeld "The Human Rights of the Mentally Ill in Europe under the European Convention on Human Rights", *Nordic Journal of International Law* 60 (1991) at 174-175.

[7] CCPR/C/79/Add.47; A/50/40, paras 179 and 186 (3 October 1995).

paragraph 1, fails to take into account the essential aim of reformation and social rehabilitation required by article 10, paragraph 3, and amounts to cruel, unusual, degrading and disproportionately severe punishment, contrary to article 7.

3.7 The authors make also make several case-specific claims. Mr. Rameka contends that the Court should not have accepted that an identified 20% risk of re-offending amounted to a substantial risk within the meaning of the statute, and that imposing a concurrent finite sentence at the same time as sentence of indefinite detention was wrong in principle. In the case of Mr. Tarawa, it is claimed that the denial of legal aid for his appeal (resulting in Mr. Tarawa preparing his own appeal papers) was wrong. Finally, Mr. Harris contends that his sentence was manifestly excessive, and that the Court of Appeal improperly considered eligibility for recall, that is to say, the liability of offender who has been released prior to serving full sentence but who commits a further offence to be recalled to serve out a full sentence, to be a relevant factor in favour of a sentence of preventive detention.

The State party's submissions on admissibility and merits

4.1 By submissions of 19 February 2003, the State party contests the admissibility and merits of the communication, describing at the outset the general features of the scheme of preventive detention. It observes that such detention is only imposed on persons aged 21 or above after they have been convicted, following a trial with full rights of fair trial and appeal, in respected of certain designated offences.[8] The sentence is imposed for past acts of serious offending, where it is the appropriate and proportional penalty to respond to the nature of that offending. That assessment of penalty is considered in the context of the offender's past and other information about him/her, including the likelihood of future offending.

4.2 The sentence may arise in two circumstances: firstly, where a person has previous similar convictions for specific serious (mainly sexual) offences, and has again offended. This has existed for some 100 years, and generally is imposed after a last warning from a sentencing judge sentencing the offender, upon an earlier occasion, to a finite term of imprisonment. Secondly, as a result of a 1993 amendment, a person can be sentenced to preventive detention in respect of an offence of sexual violation, independently of previous offences. In this case, however, additional safeguards are built in: the Court must seek a psychiatric report and be satisfied that there is a substantial risk of commission of a further specified offence upon release.

[8] The offences are (i) if committed against a child under 16, incest (s.130 *Crimes* Act 1961), sexual intercourse with a girl under care or protection (s.131), sexual intercourse with a girl under 12 (s.132), indecency with a girl under 12 (s.133), sexual intercourse or indecency with a girl between 12 and 16 (s.134), indecency with a boy under 12 (s.140), indecency with a boy between 12 and 16 (s.140A), indecent assault on a man or boy (s.141), performing or attempting anal intercourse on a person under 16 or severely subnormal (s.142), and (ii) sexual violation (s.128), attempt to commit sexual violation (s.129), compelling an indecent act with an animal (s.142A), attempted murder (s.173), wounding with intent (s.188), injuring with intent to cause grievous bodily harm (s.189(1)), aggravated wounding or injury (s.191), and throwing of acid with intent to injure or disfigure (s.199).

4.3 Safeguards are incorporated both at the imposition stage of the sentence, as well as the administration stage. The only court able to impose such a sentence is the highest court of original jurisdiction, the High Court. There is a right of appeal to the Court of Appeal, which is exercised by most sentenced to preventive detention. Only specific offences give rise to liability to the sentence. Psychiatric reports are, in practice, always sought. The courts consider whether protective purposes could be adequately served by a finite sentence of years. If the High Court does, after consideration of the full facts of the case, impose a preventive sentence, the Court of Appeal may instead substitute a finite sentence (as, for example, occurred in R v Leitch). According to the criteria set out in Leitch, the sentencing court must consider: the nature of the offences, their gravity and time span, the category of victims and the impact on them, the offender's response to previous rehabilitation efforts, the time elapsed since relevant previous offences and steps taken to avoid re-offending, acceptance of responsibility and remorse for the victims, proclivity to offending (taking into account professional risk assessment), and prognosis for the outcome of available rehabilitative treatment. Even if the statutory tests are met, the sentence remains discretionary rather than mandatory.

4.4 Turning to the administration stage, there is a generally a minimum non-parole period of 10 years, subject to the discretion of an independent Parole Board to consider the case before that point (s.97(5)). Thereafter, there are compulsory reviews of the detention undertaken at least annually by the Parole Board, which is authorised to release the prisoner at its discretion (s.97(2)). The reviews may take place even more frequently if the Parole Board so requires, or the prisoner so requests and the Board agrees (s.97(3)). The decisions of the Parole Board may themselves be reviewed in the High Court.

4.5 The State party observes that preventive detention is by no means unique to New Zealand, and that, while no communications have yet been brought to the Committee on this issue, the European Court of Human Rights has addressed it in several relevant cases. In V v United Kingdom,[9] the Court held that the sentence of "detention during Her Majesty's pleasure" was neither arbitrary, inhuman nor degrading. The respondent State party had pointed out that such a sentence enables consideration of the offender's individual circumstances, with release occurring once it is determined to be safe for the public to do so. Similarly, in T v United Kingdom,[10] the Court, recalling States' duty to take measures for the protection of the public from violent crime, considered that the Convention did not prohibit States subjecting an individual to an indeterminate sentence, where considered necessary for protection of the public.

4.6 The State party submits that it is within its discretion to resort to sentences such as preventive detention, while acknowledging the obligation that such sentences are carefully restricted and monitored, with appropriate review mechanisms in place to ensure that continued detention is justified and necessary. The European Court recognizes that once the purpose of detention has shifted from punishment to detention for prevention purposes, detention can become unlawful if there are no adequate systems of renewal in place at that point. Regular review before a body properly empowered to determine the validity of ongoing detention must be in place. The State party argues that its Parole Board has all these

[9] (1999) 30 EHRR 121.
[10] Application 24724/94.

characteristics: it is independent, chaired by a former High Court judge, follows a settled procedure, and has full powers to release prisoners. It examines a case at least annually after ten years have passed, and possibly earlier and more frequently. In addition, habeas corpus remains available.

4.7 While regarding the scheme under which the authors were sentenced as fully consistent with the Covenant, the State party observes that the scheme has since been modified to reduce the ten year non-review period to five years, and the sentencing Court has to set an appropriate non-parole period individually.

4.8 As to admissibility, the State party argues that the authors are not victims within the meaning of the Optional Protocol, concerning the aspect of the claim relating to the non-reviewability period. Further, one author has not exhausted domestic remedies. While the authors are currently serving sentences, the State party observes that they have not yet served the period that they would have had to serve had they been sentenced to a finite sentence.[11] Rather, they are currently serving the ordinary deterrent part of their sentence, and the preventive aspect has yet to arise. For Messrs. Rameka and Tarawa, any finite sentence would have been at least the equal of the 10 year non-review period (when compulsory annual review begins). Not having served the minimum period necessary for the offending, they are not yet "victims" in respect to the claims concerning preventive detention.

4.9 As to Mr. Harris, while he may have received a finite sentence of less than ten years, the State party submits that he is currently far short of the point where the preventive aspect of detention arises. Further, at that point, the Parole Board can consider his case, and refusal to do so (which could then make him a "victim" of preventive detention) could be reviewed by the courts. Accordingly, none of the authors are at the present time victims of an "actual grievance", within the meaning of the Optional Protocol, arising from any of the particular features of the scheme of preventive detention complained of. The State party invokes the Committee's jurisprudence is A.R.S. v Canada,[12] where the Committee considered inadmissible, on this basis, the author's complaint concerning a mandatory supervision system that was not yet applicable to him.

4.10 As to Mr. Tarawa, the State party submits that domestic remedies have not been exhausted. On 10 December 2001, the Crimes (Criminal Appeals) Amendment Act 2001 entered into force, providing the author with a right to apply for a full re-hearing of sentence. While leave must be obtained, the Court of Appeal has made plain that applications for re-hearing by persons such as Mr. Tarawa will be granted as a matter of course.[13] The current position for Mr. Tarawa is that if he asks, he will have a fresh appeal against his sentence; however he has not yet applied to do so. His claim is thus inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

4.11 As to the merits, the State party argues that all the authors' claims are unfounded. Regarding the claims under article 9, the State party argues that it can justify continued

[11] See paras 4.20 (Mr Rameka), 4.24 (Mr Tarawa), and 4.30 (Mr Harris), *infra.*
[12] Case No 91/1981, Decision adopted on 28 October 1981. See also T v United Kingdom, op.cit.
[13] R v Smith CA 315/96, 19 December 2002.

detention because the sentence is imposed as punishment for, and response to, proven criminal offending and because as the prevention component increases in focus, appropriate review mechanisms (as described above) concurrently become available. It is however first and foremost a penalty in the same way as discretionary life imprisonment is.

4.12 The State party argues that there are many writers who accept that there are factors and characteristics that make it more likely that a person will re-offend; paedophilia being one example where it is generally accepted that persons with this condition are much more likely to re-offend against children. There are many actuarial models used to assist risk prediction, which assign a scale of increasing values to a number of typically ten to twelve relevant factors such as previous offending, underlying mental conditions, previous rehabilitative success, and the like. The key question is where the cut-off position is then set. A variety of these models, to which New Zealand has contributed, are in operation around the world. There is common acceptance that risk prediction based on a combination of actuarial models and clinical assessments produces the best results. Thus, the State party submits there is no basis in literature to support the view that predicting future offending in a limited range of offences is so arbitrary that sentence cannot have a preventive component.

4.13 Regarding the claims of the alleged failure of the courts to address international standards and jurisprudence, the State party argues that if the challenges to the consistency with the Covenant are not valid, then the courts cannot be criticized for failure to have regard to alleged inconsistencies. The courts' task is to interpret and apply the law, having regard to international obligations in the case of lack of clarity or ambiguity. In Leitch, the authors criticize the court for failing to address these issues, but as the appellant was successful and the sentence of preventive detention quashed, there was no need to address the broader international issues. Subsequent to the filing of the current communication, counsel for the authors addressed similar arguments to the Court of Appeal in R v Dittmer.[14] The Court there observed that the Leitch court, against the background of the State party's obligations, had set out the Crown's submissions on Covenant issues with approval and pointed out that the relationship of the new regime with the Covenant had been considered in the Justice and Electoral parliamentary committee, and found to be consistent.

4.14 In response to the authors' criticisms of the Court of Appeal's decision in Leitch, the State party refers to the Committee's constant jurisprudence that matters of domestic law, and its application to particular facts, are issues for the domestic courts.[15] It points out that the issues involved are very much matters of fact, eg. "dangerousness", and the scope of particular provisions of domestic law. These issues were fully ventilated at all levels of the domestic court system. As to the Court's interpretation that notions such as "beyond reasonable doubt" were inapt further to qualify the meaning of "expediency", the State party points out that this term has always been interpreted in this manner. To the extent that the authors may be suggesting that the Covenant imposes a standard of "beyond reasonable doubt", the State party argues that this is relevant to the offence, where guilt was established beyond reasonable doubt. It is not an appropriate concept to the determination of the

[14] CA258/01, judgment of 24 October 2002.
[15] The State party refers, by way of example, to A v New Zealand Case No 754/1997, Views adopted on 15 July 1999, at paragraph 7.3.

appropriate sentence, which has always been recognized as an area of assessment and judicial discretion.

4.15 As to the authors' challenge to the Court's interpretation of "expediency", the State party observes that they seem to argue that an insufficiently high threshold has been set. The State party contends that this is very much a challenge of the application of a test to the particular facts, and it was open to the sentencing judge to find that the sentence in each case was expedient, and for the superior courts to agree. The Court of Appeal's approach that "expedient" had a standard legislative meaning was orthodox, and its listing of the detailed set of factors that a sentencing court should consider before imposing preventive detention[16] was appropriate.

4.16 On the right to presumption of innocence, the State party submits that there can be no breach, because the authors have not been charged with any further criminal offence. There are no fresh charges or allegations to which the presumption can attach. They were sentenced to preventive detention as the result of being convicted of a nominated offence through a trial that fully respected the presumption of innocence, and satisfying many other requirements. As such, the proper focus is not on whether the law can allow sentencing to take into account the need to protect society based on past offending (the State party submits that it can), but rather whether the review mechanisms in place are adequate to enable proper assessment of the need for continued detention once the prisoner has served the appropriate minimum period.

4.17 As to the alleged violation of article 10, paragraphs 1 and 3, through the provision and the timing of remedial courses, the State party observes that what is claimed in the present case falls well short of what the Committee has generally regarded as a violation of these provisions.[17] It points out that in prison, a large range of courses is available to prisoners, all aiming to improve the skills and understanding of a prisoner to help rehabilitate him or her and thus reduce the risk of re-offending. Some are specifically targeted to sexual offenders, aiming at assisting a prisoner with learning to manage themselves in the community, avoid risk situations and thus minimize likelihood of re-offending. The rule is that a prisoner takes such courses near to release, as their focus is managing the prisoner's conduct once released into the community. They are therefore most effectively undertaken near the time of release. These courses have nothing to do with access to psychiatric and psychological services and treatment, or the range of general courses, which are all available throughout the duration of the sentence. The State party doubts whether the authors have demonstrated themselves personally to be victims, as the authors have not specified which courses and/or treatment they have had, or any specific inadequacies of them.

- *Mr. Rameka*

4.18 Turning to the particular cases, the State party points out that, for Mr. Rameka, the numerous serious charges all arose from one incident. He knew where the victim lived, decided to rape her, broke into the house wearing a mask, acquired a knife from the victim and subjected her to a four hour ordeal, raping her twice as well as committing further offences. As someone convicted of sexual violation, Mr. Rameka was eligible for preventive

[16] See para 4.3, *supra*.

[17] See, for example, Hill v Spain Case No 526/1993, Views adopted on 2 April 1997.

detention if a psychiatric assessment was first obtained, and the sentencing judge was satisfied there was a substantial risk of commission of specified offence following release and further that preventive detention was expedient for the protection of the public. Even if so satisfied, the sentencing judge still had the discretion whether or not to impose the sentence. The psychiatric assessment unusually quantified the risk in a specific way ("20%") rather than, as is usual, generally describing the risk as "high" or "very high". The State party stresses that the question of substantial risk was not decided simply on the basis of this figure. Rather, after analyzing the report and its reasoning and underlying factors, as well as the circumstances of Mr. Rameka's previous and present offences, the judge considered preventive detention warranted. The Court of Appeal agreed, noting inter alia the various indices in the psychiatric report, the similarities to the previous offending involving a knife and sustained detention, and the worrying factors of the present offending.

4.19 As to the finite sentence of 14 years' imprisonment for the second rape imposed alongside the sentence of preventive detention, the State party finds it difficult to identify any objectionable aspect to this issue. It is important to recognize the individual crimes committed, not least for the community and in symbolic terms, even if the sentence is served concurrently. Moreover, concurrent finite terms can assist the Parole Board in determining the seriousness of other offences committed at the time of the primary offending.

4.20 Concerning his non-parole period, the State party points out that as a result of the 14 year sentence for the second rape, according to local regulation, he would have to serve a total of 9 years 4 months in prison on that offence alone. Adding punishment for the other offences, there is little doubt that a finite sentence requiring him to serve at least 10 years in prison would have been inevitable. Thus the 10 year non-review period arising under the preventive detention would have been the case without any such sentence, meaning that this claim is not only inadmissible but also unfounded, as he will then be eligible for annual review.

- *Mr. Tarawa*

4.21 As to Mr. Tarawa, the State party observes he pleaded guilty to five separate incidents giving rise to fifteen charges, with the main charge from the preventive detention viewpoint being a rape committed after breaking into a woman's home. Thereafter, the woman was subjected to further sexual indignities, abducted and taken to a money machine in order to withdraw money for the assailant. The further incidents included breaking into a home (holding the resident couple at gunpoint and assaulting one before they escaped), burglary of a house, assault and robbery of a 76-year old woman, and burglary of a farmhouse (threatening the female occupant with a knife, forcing her to undress and tying her up before she escaped).

4.22 The sentencing judge considered Mr. Tarawa's earlier offending, where on two occasions he broke into houses where there was a woman. On the first occasion, he forced her to undress at knifepoint but she was able to escape. The second time the victim was raped twice. The judge considered that the present offence was a replica of the earlier incident, but with more signs of professionalism. There then followed further offending, release on bail, and the final three incidents during release on bail. Two of these were robberies and the third another burglary of a home that had the same hallmarks of a targeted woman with the same sexual focus.

4.23 In the High Court, both a psychologist and psychiatrist separately identified significant risks of re-offending, with any prospects of rehabilitation dependent upon change in a person up to then seen to have a low motivation to improve. In the State party's view, the author poses a risk of the highest magnitude, particularly to women, and the Court of Appeal did not differ from the High Court's sentence.

4.24 Concerning the non-parole period, the judge noted that he would have imposed a finite sentence of 15 to 16 years for the rape if he had not imposed preventive detention, with the result that under local parole laws, he would have had to serve at least 10 years before being eligible for release. Thus, the non-review period is the same as if he had not been sentenced to preventive detention, and, apart from being inadmissible, no Covenant claim arises.

4.25 The issue of legal aid is particular to Mr. Tarawa. At the time, his appeal against sentence was determined by an ex parte system on the papers, where the Court of Appeal determined whether would-be appellants would receive legal aid for the appeal. When the Court decided an appeal was so lacking in merit that aid should not be given, it was faced with the dilemma of deciding what to do with appellants in custody who could not be present in court and who had no lawyer. Accordingly, the Court developed a system of determining these appeals on the papers, giving the appellants an opportunity to file written submissions. This ex parte system was subsequently held unlawful for want of statutory authority by the Privy Council,[18] and thus the State party accepts Mr. Tarawa was wrongly denied legal aid. Since then, remedial legislation has assigned the task of determining legal aid to an independent body with more safeguards for appeals on the papers. At the same time, the legislation provided for all whose appeals had been determined by a method held unlawful to seek a new appeal, which this author has not yet done. The State party submits the option of a fresh appeal is sufficient to redress this claim.

- *Mr. Harris*

4.26 The State party observes, in respect of this author, that he was convicted of 11 counts of sexual offending against a young boy. The sentencing judge sentenced him to a finite term of six years' imprisonment. The Crown appealed against the sentence, arguing that preventive detention should have been imposed, or that the finite sentence was manifestly inadequate and the Court of Appeal agreed. The State party points out that this represents an example of the usual preventive detention case – the author had previous paedophile convictions, served a jail term for them, and on previous sentencing was warned about the likely imposition of preventive detention if he committed a repeat offence.

4.27 In the present case, the author ingratiated himself with a young boy, inducing him to engage in various sexual activities. Police warned him to stay away from the boy after suspicions were aroused, but despite the warning the author was unable to resist further contact and committed further offences. The psychiatric report confirmed that he was a homosexual paedophile with an interest in pre-pubescent boys. Previous rehabilitation efforts, including the State party's specialized sex offender programme, had not worked, and such was his predilection to this offending that he continued despite a warning and knowledge that

[18] R v Taito (2002) 6 HRNZ 539.

he was being observed by police. Balancing these factors, the Court of Appeal considered that a finite sentence would not adequately protect the public and that preventive detention was required.

4.28 In response to the author's argument that his sentence was manifestly excessive, the State party submits that the Court of Appeal's conclusion, upheld by the Privy Council, was plainly open to it. The author represents a serious risk to the public, with a finite sentence resulting in release providing inadequate protection. If the author manages to change, he can then be released with appropriate safeguards but until that point, the community and particularly young boys should not be exposed to his predatory conduct.

4.29 As to his eligibility for review of detention, the State party observes that the Court of Appeal would have imposed a finite sentence of seven and a half years on the author as being appropriate punishment, were it not for the need to protect the public. Unlike Mr. Tarawa, the author can theoretically argue that as a result of preventive detention he is subject to longer non-parole period than if a finite sentence had been imposed. However, the State party submits that once the author reached the point where parole eligibility would have arisen under the applicable finite sentence, he can apply for release to the Parole Board (which has discretionary jurisdiction to consider requests prior to ten years of preventive detention elapsing). Only in the event of the refusal of such a claim by the Parole Board, itself subject to judicial review, could the author claim to be a victim of the non-parole period.

Comments on the State party's submissions

5.1 The authors, in reply, argue that the Covenant is not directly implemented in domestic law, and that the leading case of R v Leitch only pays lip service to the Covenant. They consider that the advice of the State party's authorities to Parliament assessing that the amendments to the preventive detention legislation were consistent with the Covenant was self-serving.

5.2 The authors observe that in the European Court cases of V v United Kingdom[19] and T v United Kingdom[20] a specific "tariff" period had been set for each individual period, representing the term of punishment during which release was precluded. Only thereafter did the preventive aspect of further detention arise. The authors contend that they do not contest the lawfulness of their preventive sentences per se, but rather that an individualised "tariff" period, followed by regular reviews, should have been set in each case. In the authors' cases, the blanket ten year non-parole period applies to all of them before the reviews begin. They argue that there has been no instance of the exercise of the Parole Board's discretionary power to review a case earlier than after ten years; this possibility is therefore illusory. They also allege that habeas corpus and judicial review applications would most likely be unsuccessful, and in any case these remedies would only arise after the ten year non-parole period had passed.

5.3 Concerning the assessment of their future "dangerousness", the authors adduce academic studies and writings suggesting flaws or imprecisions in common methods of

[19] Op.cit.
[20] Ibid.

calculation of risk prediction. They contend that the individual psychiatric assessments in their case were inadequate, that the courts were to ready to rely upon them and that thus their resulting detention became arbitrary, and refer to Canadian domestic caselaw on that State's preventive detention regime, where, according to them, "dangerousness" must be shown beyond reasonable doubt, a week's notice must be provided prior to hearing, two psychiatrists must be heard, and reviews of "dangerousness" occur after three years and then every two years.

5.4 As to the provision of courses in prison, the authors clarify that they only refer to the non-provision of courses related to their "dangerousness" until near the time of release. They therefore claim that they have no opportunity to cease to be "dangerous" earlier in their sentence, which should occur as early as possible. This is said to be cruel and unusual, lacking humanity and not in line with the notion of rehabilitation. Moreover, early parole requests may be adversely affected by failing to have undergone treatment.

5.5 As to the admissibility of Mr. Tarawa's case on the question of appeal possibilities, it is contended that the new appeal only became possible as a result of the recent decision of the Court of Appeal in R v Smith,[21] subsequent to the submission of the communication. In any case, it would be futile as a recent appeal against preventive detention was dismissed in another case.[22]

5.6 As to the issue in Mr. Rameka's case of imposition of a finite sentence, alongside preventive detention, the author rejects the State party's argument that there is no authority in objection to such a practice. He refers, by analogy, to English criminal practice, which regards the imposition of a finite sentence alongside a life sentence as mistaken.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As to whether the authors can claim to be victims of a violation of the Covenant concerning preventive detention, as they have not yet served the amount of time that they would have had to have served to become eligible for release on parole under finite sentences applicable to their conduct, the Committee observes that the authors, having been sentenced to and begun to serve such sentences, will become effectively subject to the preventive detention regime after they have served 10 years of their sentence. As such, it is essentially inevitable that they will be exposed, after sufficient passage of time, to the particular regime, and they will be unable to challenge the imposition of the sentence of preventive detention upon them at that time. This situation may be contrasted with that in A.R.S. v Canada,[23] where the future application of the mandatory supervision regime to the prisoner in question

[21] Op.cit.
[22] R v Dittmer, op. cit.
[23] Op.cit.

was at least in part dependent on his behaviour up to that point, and thus speculative at an ealier point of time in the imprisonment. The Committee accordingly does not consider it inappropriate that the authors argue the compatibility of their sentence with the Covenant at an earlier point, rather than when ten years' imprisonment have elapsed. The communication is thus not inadmissible for want of a victim of a violation of the Covenant.

6.3 As to Mr. Tarawa's case, the Committee observes that after flaws in the earlier system of disposing appeals on the papers after a denial of legal aid became apparent, the State party passed the Crimes (Criminal Appeals) Amendment Act 2001 entitling those affected, including Mr. Tarawa, to apply for re-hearing of dismissed appeals (in Mr. Tarawa's case, the Court of Appeal's dismissal on 20 July 2000 of his conviction and sentence of 2 July 1999). Such an appeal could have challenged the appropriateness, as a matter of domestic law, of imposing preventive detention in view of the particular facts of his case, independently of appellate decisions on the penalty applicable to the facts of other cases. Accordingly, the Committee observes that Mr. Tarawa failed to exhaust a domestic remedy available to him to challenge his sentence at the time of submission of the communication. Thus, his claims relating to the imposition of preventive detention and consequential claims are inadmissible under article 5, paragraph 2(b), of the Optional Protocol. As to the residual claim concerning the earlier denial of legal aid, the Committee observes that for the same reasons, this claim was deprived of object before the submission of the communication upon the provision of the new ability to appeal coupled with a fresh assessment of legal aid; as a result, this claim is inadmissible under article 2 of the Optional Protocol.

6.4 As to the contention that certain rehabilitation courses were not available to the authors in prison, contrary to articles 7 and 10 of the Covenant, the Committee notes that the authors have not specified in any detail which courses they claim they should be entitled to undertake at an earlier point of imprisonment, and that the State party has observed that all standard courses are available throughout the term of imprisonment, while certain courses of immediate relevance to post-release situations are conducted prior to release in order to enhance the appropriateness of timing. The Committee accordingly considers that the authors have failed to substantiate, for the purposes of admissibility, that the timing and content of courses made available in prison, give rise to claims under articles 7 and 10 of the Covenant.

6.5 As to whether the imposition of preventive detention in the cases of Messrs. Harris and Rameka ('the remaining authors') is consistent with the Covenant, the Committee considers this claim to have been sufficiently substantiated, for purposes of admissibility, under articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and 14, paragraph 2, of the Covenant.

Consideration of the merits (*Cases of Messrs. Rameka and Harris*)

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 in article 5, paragraph 1 of the Optional Protocol.

7.2 The Committee observes at the outset that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less than" seven and a half years with respect to his offences. Accordingly, Mr. Harris will serve two and a half years of detention, for preventive purposes, before the non-parole period arising under his sentence of preventive detention expires. Given that the State party has demonstrated no case where the Parole Board has acted under its exceptional powers to review *proprio motu* a prisoner's continued detention prior to the expiry of the non-parole period, the Committee finds that, while Mr. Harris' detention for this period of two and a half years is based on the State party's law and is not arbitrary, his inability for that period to challenge the existence, at that time, of substantive justification of his continued detention for preventive reasons is in violation of his right under article 9, paragraph 4, of the Covenant to approach a "court" for a determination of the 'lawfulness' of his detention over this period.

7.3 Turning to the issue of the consistency with the Covenant of the sentences of preventive detention of both the remaining authors, Messrs. Rameka and Harris, once the non-parole period of ten years expires, the Committee observes that after the ten-year period has elapsed, there are compulsory annual reviews by the independent Parole Board, with the power to order the prisoner's release if they are no longer a significant danger to the public, and that the decisions of the Board are subject to judicial review. The Committee considers that the remaining authors' detention for preventive purposes, that is, protection of the public, once a punitive term of imprisonment has been served, must be justified by compelling reasons, reviewable by a judicial authority, that are and remain applicable as long as detention for these purposes continues. The requirement that such continued detention be free from arbitrariness must thus be assured by regular periodic reviews of the individual case by an independent body, in order to determine the continued justification of detention for purposes of protection of the public. The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.

7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and Court of Appeal. In the Committee's view, it also follows from the permissibility, in principle, of preventive detention for protective purposes, always provided that the necessary safeguards are available and in fact enjoyed, that detention for this purpose does not offend

the presumption of innocence, given that no charge has been laid against the remaining authors which would attract the applicability of article 14, paragraph 2, of the Covenant.[24] As the detention in the remaining authors' cases for preventive purposes is not arbitrary, in terms of article 9, and no suffering going beyond the normal incidents of detention has been suggested, the Committee also finds that the remaining authors have not made out any additional claim under article 10, paragraph 1, that their sentence of preventive detention violates their right as prisoners to be treated with respect for their inherent dignity.

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 of the view that the facts before it disclose a violation of article 9, paragraph 4, of the Covenant with respect to Mr. Harris.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Harris with an effective remedy, including the ability to challenge the justification of his continued detention for preventive purposes once the seven and a half year period of punitive sentence has been served. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State 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 and subject to its jurisdiction the rights recognised in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

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[24] See also Wilson v The Philippines Case No 868/1999, Views adopted on 30 October 2003, at paragraph 6.5.

APPENDIX

Individual Opinion of Committee members Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Glèlè Ahanhanzo and Mr. Hipólito Solari Yrigoyen
(dissenting in part)

In stating, in paragraph 7.2 of its decision, that Mr. Harris' detention is based on the State party's law and is not arbitrary, the Committee proceeds by assertion and not by demonstration.

In our view, the arbitrariness of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence. The science underlying the assessment in question is unsound. How can anyone seriously assert that there is a "20% likelihood" that a person will re-offend?

To our way of thinking, preventive detention based on a forecast made according to such vague criteria is contrary to article 9, paragraph 1, of the Covenant.

However far any checks made when considering parole may go to prevent violations of article 9, paragraph 4, of the Covenant, it is the very principle of detention based solely on potential dangerousness that I challenge, especially as detention of this kind often carries on from, and becomes a mere and, it would not be going too far to say, an "easy" extension of a penalty of imprisonment.

While often presented as precautionary, measures of the kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the Covenant.

For the defendant, there is no predictability about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing presumption of innocence by presumption of guilt.

Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender.

Such a situation is a source of legal uncertainty and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant.

[*Signed*]: Prafullachandra Natwarlal Bhagwati
[*Signed*]: Christine Chanet
[*Signed*]: Maurice Glèlè Ahanhanzo
[*Signed*]: Hipólito Solari Yrigoyen

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

Individual Opinion of Committee member Mr. Walter Kälin
(dissenting in part)

The Committee concludes, in paragraph 7.2 of its Views, that Mr. Harris will serve two and a half years of detention, for preventive purposes, before he can approach the Parole Board after a total of ten years of detention and that the denial of access to a "court" during this period amounts to a violation of his right under article 9, paragraph 4, of the Covenant. This finding is based on the assumption that Mr. Harris would have been subjected, according to the Court of Appeal, to a finite sentence of "not less" than seven and a half years with respect of his offences. While the Court of Appeal did, indeed, observe that the case would warrant a finite sentence of "not less" than seven and a half years, it did not impose such a finite sentence, but rather substituted a sentence of preventive detention from the outset. Finite sentences are to be proportionate to the seriousness of the crime and the degree of guilt, and they serve multiple purposes, including punishment, rehabilitation and prevention. In contrast, as is clearly spelled out in section 75 of the State party's Criminal Justice Act 1985, preventive detention does not contain any punitive element, but serves the single purpose of protecting the public against an individual in regard to whom the court is satisfied "that there is a substantial risk that [he] will commit a specified offence upon release." Although preventive detention is always triggered by the commission of a serious crime, it is not imposed for what the person concerned did in the past, but rather for what he is, i.e. for being a dangerous person who might commit crimes in the future. While preventive detention for the purpose of protecting the public against dangerous criminals is not prohibited as such under the Covenant and its imposition sometimes cannot be avoided, it must be subject to the strictest procedural safeguards, as provided for in article 9 of the Covenant, including the possibility for periodic review, by a court, of the continuing lawfulness of such detention. Such reviews are necessary as any human person has the potential to change and improve, i.e. to become less dangerous over time (e.g. as a consequence of inner growth or of a successful therapy, or as a result of an ailment reducing his physical abilities to commit a specific category of crimes). In the present circumstances, Mr. Harris did not receive any finite sentence aimed at sanctioning past conduct, but was detained for the sole reason of protection of the public. Therefore, I conclude that his right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (article 9, paragraph 4) was not only violated during the last two and a half years of the first ten years of preventive detention, but also during that whole initial period. For the same reasons, I would find that the detention over the same initial period of 10 years prior to review by the Parole Board would also be in violation of article 9, paragraph 4, with respect to Mr. Rameka.

[*Signed*]: Walter Kälin

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

Individual Opinion of Committee member Mr. Rajsoomer Lallah
(dissenting)

I am unfortunately unable to join the majority in the Committee in their conclusion that there has been no violation of the Covenant except in the case of Mr. Harris where a violation was found in respect of article 9, paragraph 4, of the Covenant (paragraph 7.2 of the Committee's Views). Nor do I agree, for the reasons explained in Paragraph 2 of this Separate Opinion, that the Committee should have declared the communication admissible only in respect of articles 7, 9, paragraphs 1 and 4, 10, paragraphs 1 and 3, and, finally, 14, paragraph 2, of the Covenant (paragraph 6.5 of the Views), and not articles 14 and 15, paragraph 1.

Admittedly, the authors would appear, from paragraph 1 of the Views, to have mentioned particular provisions of the Covenant. However, under the Optional Protocol, authors need only aver facts and offer submissions and arguments in support of their complaint so that the State party may be given an opportunity to address them. Indeed, many authors have done so in the past. And it in the province of the Committee to consider and determine, in the light of all the information provided by the authors and the State party, which particular provisions of the Covenant are or are not relevant. In any event, in considering the application or interpretation of particular provisions of the Covenant, it may be necessary to consider the impact of other provisions of the Covenant, provided always that both sides have been given the opportunity of addressing the particular facts, submissions or arguments put forward by the other party.

The complaint of the authors covers a number of issues. The most important among these is, in my view, their contention that preventive detention in their case is inconsistent with the Covenant, in particular, in that they were effectively being sentenced and punished for what they might do when released, rather than for what they have done, that is to say, they were being punished for crimes which had not been, and which might never be, committed. This complaint requires, in my view, consideration of the application of articles 14 and, also, 15, paragraph 1, of the Covenant.

With respect, the majority in the Committee would appear to have simply assumed that the "preventive detention" prescribed in New Zealand law expressly as a "sentence" or penalty for certain criminal offenses is legitimate under article 9 of the Covenant. Undoubtedly, the provision in the second sentence of article 9, paragraph 1, of the Covenant leaves it to States parties to determine the grounds, and the procedure in accordance with which, a person may be deprived of his liberty

As the Committee has pointed out as far back as 1982 in General Comment No. 8 in relation to article 9 of the Covenant, paragraph 1 of that article is applicable to all deprivations of liberty, whether in criminal cases or such other cases as mental illness, vagrancy, drug addiction, educational purposes and immigration control, etc. However, both the grounds and the procedure required to be prescribed by law under article 9, paragraph 1, must be consistent with the other rights recognised in the Covenant.

It is axiomatic, therefore, that where one of the grounds relied upon is a certain type of conduct, in particular circumstances, which is created into a criminal offence and

sanctioned by law by deprivation of liberty, then not only must the particular offence created but its sanction as well must comply with the guarantees provided in article 15, paragraph 1, of the Covenant. In my view, two important features, among others, characterise article 15, paragraph 1. Firstly, a criminal offence relates only to past acts. Secondly, the penalty for that offence can only relate to those past acts. It cannot extend to some future psychological condition which might or might not exist in the offender some ten years thereafter and which might or might not lead an offender who has already purged the punitive part of his sentence to be exposed to the risk of further detention. Further, the trial for such offences and the sanction to be imposed must also satisfy the requirements of a fair trial guaranteed under article 14 of the Covenant.

Rape is undoubtedly a serious offence and violence against women requires the adoption of all appropriate measures by a State party to deal with the problem, including penalisation, which meets the guarantees of articles 14 and 15 of the Covenant, and treatment, reformation and social rehabilitation of offenders which the State party is under an obligation to undertake in pursuance of article 10, paragraph 3, of the Covenant. There is further nothing which would prevent a State party from adopting measures to supervise and effectively monitor, administratively or by the Police, the behaviour of past offenders on release, in circumstances where there are reasonable and good grounds for apprehending their re-offending.

Now, according to the information provided by the authors and the State party, it would seem that that the minimum period of preventive detention was legislatively fixed at the relevant time to 10 years and has now been reduced to 5 years, but is not subject to a maximum period. This maximum period of detention is thus removed from the jurisdiction of the trial Court and is left to a Parole Board, with the result that the trial Court is legislatively prevented from passing a finite sentence. The State party considers that the legislatively fixed minimum period of 10 years is the punitive part of the sentence, the Parole Board being entrusted with the competence of periodically determining the finality of the sentence, on the reasoning that the sentence becomes preventive and, in principle, without a maximum limit. This in itself would clearly raises a serious question of proportionality.

I note that the material before the Committee indicates that the detention following the so–called punitive period continues in prison. In these circumstances, the “punitive” and “preventive” parts of the sentence become, in reality, a distinction without a difference. When stripped of the colourable statutory device which purportedly confers power to sentence on the trial Court, the reality is that, in substance and in practice, it is only part of the sentence which is left to the trial Court (and that too at a legislatively fixed minimum over which the trial Court has no control or discretion). The rest of the sentence is left in the hands of an administrative body, without the due process guarantees of article 14. There is of course nothing wrong in legal measures enabling early release, but enabling an administrative body to determine in effect the duration of the sentence beyond the statutory minimum is another matter.

I would thus conclude as follows:

i) While it is legitimate to consider past conduct, good or bad, as a relevant factor in determining sentence, a violation of article 15, paragraph 1, of the Covenant has

occurred, because that article only permits the criminalization and sanctioning, by law, of past acts but not acts which it is feared might occur in the future**.**

ii) A violation of article 15, paragraph 1, has occurred, also because the law does not prescribe a finite sentence to be imposed by the trial Court.

iii) A violation of article 14, paragraph 1, has occurred in that a fair trial requires that the Court before which a trial is conducted must have the jurisdiction to pass a definitive sentence and not one that is legislative fixed to a minimum of years. Furthermore, the law of the State party, in effect, delegates this jurisdiction to an administrative body which will determine the length of the sentence at some time in the future, without the due process guarantees prescribed under article 14 of the Covenant.

iv) A violation of article 14, paragraph 2, has also occurred because an anticipatory assessment of what may happen after a lapse of 10 years or so, even before the benefits of treatment, reformation and social rehabilitation required under article 10, paragraph 3, of the Covenant have taken place, could not conceivably meet the essential burden of proof required. In this regard, though relevant in determining sentence, even previous convictions concerning past criminal conduct require to be proved beyond reasonable doubt where these are disputed by the person accused.

v) It is not correct, therefore, to find a violation of article 9, paragraph 4, of the Covenant, as it is inapplicable in the light of the above approach. If a finding of a violation of article 9 is at all necessary, then it would be article 9, paragraph 1, because the State party has failed to construe it in the light of other applicable provisions of the Covenant, in particular articles 14 and 15 of the Covenant. But a violation of these latter articles or relevant provisions of those articles has already been found.

[*Signed*]: Rajsoomer Lallah

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

Individual Opinion of Committee members Mr. Shearer and Mr. Roman Wieruszewski, in which Committee member Mr. Nisuke Ando joins
(dissenting in part)

In our view, the reasons for deciding that the State party is not in violation of the Covenant in respect of the sentence of preventive detention imposed on Mr. Rameka, with which we agree, apply equally to the case of Mr. Harris. The ground of distinction between the cases of the two remaining authors, drawn by the Committee, is that in the case of Mr. Rameka a finite sentence of fourteen years imprisonment was imposed on one count of the indictment to be served concurrently with the sentence of preventive detention imposed on another count. In the case of Mr. Harris, the concurrent finite sentence would have been seven and a half years, had the Court of Appeal not decided that a sentence of preventive detention was justified for the protection of the community thus leaving a gap of two and a half years between the expiry of that potential sentence and the end of the non-parole period of the sentence of preventive detention (at ten years).

The author himself did not advance any argument before the Committee based upon an actual or hypothetical non-review "gap" period.

It is not appropriate, in our opinion, to separate indefinite preventive detention into punitive and preventive segments. Unlike finite sentences, which are based on the traditional purposes of imprisonment – to punish and to reform the offender, to deter the offender and others from future offending, and to vindicate the victim and the community – sentences of preventive detention are designed solely to protect the community against future dangerous conduct by an offender in respect of whom past finite sentences have manifestly failed to achieve their aims.

Under the State party's law applicable to the authors a sentence of preventive detention runs for ten years before the sentence may be reviewed by the Parole Board (whose decisions are subject to judicial review). As a result of a recent amendment to that law, the non-review period has been shortened to five years. Even the longer period cannot be regarded as arbitrary or unreasonable in the light of the conditions governing the imposition of such a sentence. We consider that the State party's law in respect of preventive detention cannot be regarded as contrary to the Covenant. In particular, article 9, paragraph 4, of the Covenant cannot be construed so as to give a right to judicial review of a sentence on an unlimited number of occasions.

[*Signed*]: Ivan Shearer
[*Signed*]: Roman Wieruszewski

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

Individual Opinion of Committee member Mr. Nisuke Ando
(dissenting in part)

I concur fully with the opinion of Messrs. Shearer and Wieruszewski. Moreover, I would like to add the following:

The majority Views seem to find a violation of article 9, paragraph 4, in the case of Mr. Harris on the assumption that the period of imprisonment under the relevant New Zealand law should be divided into a punitive detention part, which consists of a definite or fixed time-period (non-parole period) and a preventive detention part, which consists of indefinite or flexible time-period. In my view, this assumption of a division is artificial and not valid.

In many other States parties to the Covenant, domestic courts often sentence a convict to imprisonment for flexible time-period (e.g. five to ten years) so that, while he/she must be imprisoned for the shorter time-period (five years), he/she can be released before the longer time-period (ten years) depending on his/her conditions of improvement or amelioration. In substance, this sentencing of imprisonment for a flexible period of time is comparable to the regime of preventive detention under the New Zealand law.

The term "preventive detention" may give an impression that it is primarily detention of administrative nature as opposed to detention of judicial nature. However, the Committee should look into not the name but the substance of any institution of law of a State party in determining its legal character. In other words, if the Committee considers the sentencing of imprisonment for a flexible period of time to be compatible with the Covenant, there is no reason why it should not do the same with preventive detention under the New Zealand law. In fact, article 31, paragraph 2, of the Covenant requires that the Committee should represent "the principal legal systems" of the world.

[*Signed*]: Nisuke Ando

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