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Human Rights Committee

Communication No. 1968/2010

Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Bronson Blessington and Matthew Elliot (represented by Human Rights Law Centre)
<i>Alleged victim:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	14 April 2010 (initial submission)
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<i>Date of adoption of Views:</i>	22 October 2014
<i>Subject matter:</i>	Imposition of life sentence on juveniles
<i>Substantive issues:</i>	Cruel, inhuman and degrading treatment; essential aims of the penitentiary system; retroactive application of penal legislation; right of minors to protection
<i>Procedural issues:</i>	None
<i>Articles of the Covenant:</i>	7; 10 (para. 3); 15 (para. 1); 24 (para. 1)
<i>Article of the Optional Protocol:</i>	None

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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 (112th session)

concerning

Communication No. 1968/2010*

Submitted by: Bronson Blessington and Matthew Elliot
(represented by Human Rights Law Centre)

Alleged victim: The authors

State party: Australia

Date of communication: 14 April 2010 (initial submission)

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

Meeting on 22 October 2014,

Having concluded its consideration of communication No. 1968/2010, submitted to the Human Rights Committee by Bronson Blessington and Matthew Elliot 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:

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

1. The authors of the communication dated 14 April 2010 are nationals of Australia, Bronson Blessington, born on 21 October 1973, and Matthew Elliott, born on 16 April 1972. At the time of submission of the communication they were serving sentences of life imprisonment at the Mid North Coast Correctional Centre and the Junee Correctional Centre, New South Wales, respectively. They claim to be victims of violations by Australia of articles 7, 10, paragraph 3, 15, paragraph 1, and 24, paragraph 1 of the International Covenant on Civil and Political Rights. The authors are represented.¹

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Gerald Neuman, Victor Manuel Rodríguez-Rescia, Fabián Salvioli, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval, and Andrei Paul Zlătescu.

¹ The Optional Protocol entered into force for Australia on 25 December 1991.

The facts as submitted by the authors

2.1 Mr. Blessington's parents separated when he was six and divorced some years later. After the separation he resided with his mother and younger sister. The children were often left unattended whilst the mother worked. Subsequent psychological and psychiatric reports indicate that he had great difficulty coping with the splitting up of his family and that his behavioural difficulties appear to have commenced around that event, including running away, schooling difficulties, general misbehaviour and lying. Those reports also indicate that, as a child, Mr. Blessington succumbed to several bouts of pneumonia and that he was physically assaulted by his mother's new partner. At around 13 years of age he was living with his father in a variety of caravan parks, youth refuges and facilities for the homeless. During the time spent in caravan parks he was repeatedly sexually assaulted by two male persons, one of whom was a friend of his father. Despite reporting these assaults to both his father and medical professionals, no action was taken.

2.2 Between 1978 and 1988, Mr. Blessington attended at least 13 different schools. In 1987, while at Raymond Terrace High School, he was assessed by a clinical psychologist and a psychiatrist and both recommended further assessment and monitoring. It was also around the age of 13 that his substance abuse began and he developed a nervous twitch as a result of petrol sniffing. He has numerous scars on his arms from intentionally burning himself with cigarettes. Psychiatric evidence tendered at trial in connection with the facts described below indicated that he had a severe conduct disorder and "an abnormality of mind from an inherent cause", which was present at the time of the offence and fitted the criteria for a defence of diminished responsibility. The psychiatrist considered that condition as transient and expected it to be resolved in time.

2.3 Mr. Elliott's upbringing was marked by persistent exposure to domestic violence at the hands of his father, who took overly forceful disciplinary measures against him, such as striking him with a cricket bat and choking him, as recorded in psychological reports. A medical report issued by the Royal Alexandra Hospital for Children in Camperdown on 19 March 1985 indicated that he presented "multiple bruises, consistent with direct blows received by punching and marks to the neck consistent with attempted strangulation. This degree of injury is non-accidental and is entirely consistent with a violent assault." As he entered high school a pattern of severe behavioural problems began. As of 1985, he spent a great amount of time in custody, in different juvenile detention facilities and institutions, due to multiple convictions for a variety of offences, including breaking and entering with intent, theft of a motor vehicle, receiving stolen property and malicious damage. During that year, at the age of 13, he was sexually abused by a 40-year-old man known to be a paedophile by the New South Wales Department of Family and Community Services. Some two weeks later, Mr. Elliott absconded from Reiby Detention Centre, where he was held at the time, and set fire to the perpetrator's home, an offence for which he received a 15-month committal. In late 1985, his solicitor attempted to sexually assault him and was subsequently charged in relation to the assault of other young boys. Mr. Elliott also alleges that he was sexually assaulted again in 1987 by a man who was later charged for it, but the charges were eventually dropped for lack of evidence. A later psychological report noted that he presented diagnostically as a "conduct disordered youth". In July 1988, he left home and started to live on the streets in Sydney. That is where he met Mr. Blessington in 1988.

2.4 On 6 September 1988, the authors, at the time aged 14 and 15 respectively, assaulted W.P. with a makeshift hammer, a crime for which they were sentenced in 1990. That was the first crime of violence either of them had committed. On 8 September 1988, the authors and three other street children abducted Ms. J.B. at knifepoint from the car park of a train station. They absconded with her in her own motor vehicle and took her to a location near Minchinbury, where she was raped. Ms. J.B. was then bound and carried to a nearby lake, where she was drowned. Her body was left in the lake and the group departed in her motor

vehicle after stealing several items of value from her, including two rings, a watch and her ATM card. The authors later travelled to the town of Gosford, where they stole another motor vehicle.

2.5 At the trial for those offences, three of the co-offenders, including both authors, were said to be the main perpetrators of the assault and were tried jointly for the murder, abduction and rape of Ms. J.B., although they pleaded not guilty to the charges of rape and murder. On 21 June 1990, following a month-long trial, the authors were convicted of the rape and murder of Ms. J.B.

2.6 The authors were tried as adults, but the Children (Criminal Proceedings) Act 1987 (NSW), applicable to the conduct of criminal proceedings against children, was complied with and consideration was given to their age. The trial judge found, as a matter of fact, that the rapes were carried out by Mr. Blessington and the third offender.² The judge also found that Mr. Elliott did not directly perpetrate rape. However he was charged and found guilty of rape by virtue of the common purpose of the offenders. Culpability for the drowning of Ms. J.B. was distributed equally between the two authors and the third offender. On 18 September 1990, Justice Newman of the Supreme Court of NSW (Criminal Division) handed down sentences for the authors. Justice Newman took into account their youth and the principles laid down in various cases regarding the sentencing of juveniles. However, he determined that “the facts surrounding the commission of these crimes are so barbaric that I believe I have no alternative other to impose upon both prisoners, even despite their age, a life sentence. So grave is the nature of this case that I recommend that none of the prisoners in this matter should ever be released”. In sentencing the authors, Justice Newman commented that he found it to be a difficult task, because of their extreme youth and in terms of the principles of law which he was obliged to apply.

2.7 At the time that the offences were committed in 1988, section 19 of the Crimes Act 1900 (NSW) provided that murder was punishable by mandatory life in prison for adult offenders. That penalty was discretionary for juvenile offenders. At that time, a life sentence did not mean for the term of a person’s natural life. The exact term of a life sentence depended on other judicial and administrative processes. After 10 years had been served, the person could apply to the executive for release on licence. In January 1990, that scheme was abolished and replaced with a right to apply to the Supreme Court of New South Wales for a determination of the life sentence after eight years had been served,. The authors were sentenced on 18 September 1990.

2.8 Changes to sentencing legislation introduced in 1997, 2001 and 2005 successively eroded and ultimately removed the right of the authors to seek a date for release. As a result of those changes, the authors must serve 30 years of their life sentence before being permitted to apply for a determination of their sentence. Upon making such an application they must demonstrate special reasons to justify such a determination.³ Should a determination be granted, the Supreme Court of New South Wales would be limited to

² Namely, Mr. J., aged 22 at the time, and assessed by a psychiatrist as “mentally retarded”.

³ Schedule 1 of the Crimes (Sentencing Procedure) Act 1999:

2. Applications for determination of non-parole periods

(1) Subject to clauses 6 and 6A (2), an offender serving an existing life sentence may apply to the Supreme Court for the determination of a term and a non-parole period for the sentence.

(2) An offender is not eligible to make such an application unless the offender has served:

... (b) at least 30 years of the sentence concerned, if the offender is the subject of a non-release recommendation.

(3) An offender who is the subject of a non-release recommendation is not eligible for a determination referred to in subclause (1) unless the Supreme Court, when considering the offender’s application, is satisfied that special reasons exist that justify the making of such a determination.

setting a non-parole period, following which, the New South Wales State Parole Authority could only release the authors on parole if, among other requirements, they are either in “imminent danger of dying”, or “incapacitated to the extent that they no longer have the physical ability to do harm to any person”. Those requirements apply irrespective of the author’s conduct and progress at rehabilitation. If the authors are unsuccessful in their application for a determination, then no non-parole period will be set and the authors will remain in prison until death.

2.9 In 1992, the authors appealed their conviction for murder and sought leave to appeal against their sentences before the New South Wales Court of Criminal Appeal, pursuant to section 5 of the Criminal Appeal Act 1912 of New South Wales (first appeal). Mr. Blessington abandoned his appeal against conviction part-way through the hearing and Mr. Elliott’s appeal against conviction was dismissed. Leave to appeal against their sentence was granted, but their appeals were unanimously dismissed. The Court held that the imposition of life sentences was within the range of statutory discretion and was appropriate to the facts of the case and the circumstances of the authors.

2.10 Chief Justice Gleeson, who delivered the appeal judgement, observed that: “no error of fact or principle has been shown in relation to Newman J’s remarks on sentences, and the sentences cannot be characterised as manifestly excessive. Under the relevant legislation, the appellants will have a right, after a lapse of a certain period of time, to apply to a Judge of this Court to change the indeterminate sentences to determinate sentences. A decision in that regard can then be made in light of all the relevant factors, including the custodial history of the appellants up to the date of the application”. Justice Gleeson also observed that because of their young age at the time of their offences, the authors should not have had their files marked “never to be released”. He stated that “especially where the offender is a young person and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made by other persons, and in other proceedings, or under other legislation, over the ensuing decades. For that reason, I should indicate that I do not support the recommendation made by Newman J.”

2.11 In 2006, the authors sought leave to reopen their first appeal and to appeal against the recommendation made by the trial judge in 1990. Alternatively, they asked the Court to quash the life sentence and impose a determinate sentence. The appeal was heard by the Court of Criminal Appeal on 30 March 2006 and the judgement was handed down on 22 September 2006. The Court refused the leave to appeal. It held that, although the recommendation had had no legal effect at the time it was made, the legislative changes introduced afterwards gave it practical and legal effect.

2.12 The authors appealed against that decision to the High Court, which dismissed the appeal on 8 November 2007. The High Court did, however, note that the significant number of legislative changes that occurred between 1992 and 2006 were “striking and unusual”. No further legal appeal is possible and therefore the authors contend that they have exhausted domestic remedies.

2.13 The authors state that, while in prison, they have expressed remorse for the death of Ms. J.B. and accepted responsibility for their role in the crimes.

The complaint

3.1 The authors submit that the facts described constitute a violation of articles 24, paragraph 1, 10, 7, and 15, paragraph 1, of the Covenant.

Claim under article 24, paragraph 1

3.2 The imposition of a life sentence without possibility of parole for crimes the authors committed as juveniles is inherently incompatible with the obligations of the State party under article 24, paragraph 1, of the Covenant. Article 37 (a) of the Convention on the Rights of the Child states that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age”.⁴ By the operation of clause 2 (2) (b) of Schedule 1 of the Crimes (Sentencing Procedure) Act 1999, the authors may only make an application for a redetermination of their respective sentences after 30 years have elapsed. If they are unsuccessful then no non-parole period will be set and they will be imprisoned until they die. The legislation specifically provides for the rejection of such an application. If no non-parole period has been set, then the New South Wales State Parole Authority will have no lawful basis upon which to release them. If an application is successful, then the authors may apply for release on parole to the Parole Authority after the (further) expiration of the non-parole period set by the Supreme Court. However, under section 154 A (3) of the Crimes Administration of Sentences Act 1999, release is only possible in case of imminent danger of death or incapacity to the extent that the person no longer has the physical ability to harm.

3.3 No account is made in the legislation for the age of the person at the time of the offence. In terms of release on parole, adult and juvenile offenders are treated in exactly the same way. As for the system of imprisonment governing the authors, contrary to article 40, paragraph 1, of the Convention on the Rights of the Child, no account is taken of the prisoners’ age at the time of the offence or the desirability of promoting their reintegration so that they may assume a constructive role in society. Further, there is no process of regular review of the authors’ development and progress in order to decide on their possible release. Section 154 A of the Crimes Administration of Sentences Act 1999 effectively overrides consideration of such issues. In fact, the Government of New South Wales has been quite unapologetic in insisting that the authors should remain in prison forever. While the authors accept their sentence to a term of imprisonment, their status as juvenile offenders gave them a right to protection. An earlier release date, or the possibility of achieving one, would have allowed for recognition of their age and lack of maturity at the time of the offence and the possibility of reform and rehabilitation.

Claim under article 10, paragraph 3

3.4 The authors submit that the State party is in breach of article 10, paragraph 3, of the Covenant as the imposition of a life sentence without the possibility of parole in respect of a juvenile offender is incompatible with the requirement that the essential aims of the penitentiary system be “reformation and social rehabilitation”.⁵ A life sentence is also incompatible with the requirement that juvenile offenders be accorded treatment appropriate to their age and legal status.

⁴ The authors refer as well, among others, to General Assembly resolution 61/146, in which the Assembly called upon States to abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence.

⁵ The authors refer to general comment No. 21 (1992) of the Committee on humane treatment of persons deprived of their liberty) and to article 37 (b) of the Convention on the Rights of the Child.

Claim under article 7

3.5 The authors contend that the imposition of a life sentence on a juvenile constitutes cruel, inhuman and/or degrading punishment.⁶ While life imprisonment is, arguably, not of itself a breach of article 7, the imposition of such a sentence upon a juvenile transforms the sentence into a breach of the Covenant.

Claim under article 15, paragraph 1

3.6 The authors claim that the State party is in breach of its obligation under article 15, paragraph 1, of the Covenant by failing to ensure that they did not become subject to a heavier penalty than the one that was applicable at the time when the criminal act was committed. The retroactive application to the authors of the legislative amendments had the effect of removing the prospect of their release on parole before the end of their lives.

State party's observations on admissibility and merits

4.1 The State party submitted its observations on the communication on 31 May 2012. Noting that the authors had appealed their sentences to the High Court and that the allegations raised complex questions of law and fact, the State party did not contest the admissibility of the communication. However, the State party argues that all claims are without merit and should be dismissed by the Committee.

4.2 According to the sentencing judgement, on 8 September 1988, the authors and three other persons formed a plan to attack a lone woman at random and rape her. In a car park they tried to abduct a woman, who managed to escape. They then selected Ms. J.B. and abducted her at knifepoint in her own car. It was proven at trial that the authors and Mr. J. collectively forced Ms. J.B. to submit to sexual penetration, then bound her legs to her neck, stuffed a scarf into her mouth, carried her to a nearby lake and immersed her until she drowned. After that, the group went to a nearby shopping centre where they attempted to sell jewellery they had stripped from Ms. J.B. They extracted the maximum amount of money possible from her bank account using her bank card after obtaining from her the personal identification number. The following day, the authors travelled to a city north of Sydney, where they stole another car. They were arrested upon returning to Sydney that same day.

4.3 Mr. Elliot was found guilty of the abduction and murder, two charges of sexual intercourse (actions directly committed by his two co-accused) and two charges of robbery in company. Mr. Blessington was found guilty of abduction and murder, one charge of sexual intercourse directly perpetrated by him and two charges of robbery in company. The authors were concurrently sentenced for maliciously inflicting grievous bodily harm on Mr. W.P. in a separate incident that occurred on 6 September 1988.

4.4 At the time of the offences, life imprisonment was a discretionary penalty for juveniles. The judge described the jury's findings as reflecting "criminal responsibility of the highest degree". He acknowledged the difficult and deprived backgrounds of the authors, which featured a persistent degradation of basic human values leading "inevitably to serious criminal activity". He took into account the "extreme youth" of the authors and cited with approval previous authority that in the case of a young offender, the public interest is first and foremost in rehabilitating that person to become a good citizen. However, he concluded that he had no alternative other than to impose a life sentence. The

⁶ The authors refer to the general comment No. 20 (1992) of the Committee on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment and to Communication No. 265/87, *Vuolanne v. Finland*.

authors' sentences were litigated extensively and upheld in successive cases before Australian courts.

4.5 Legislative amendments in 1997, 2001 and 2005 created the sentencing regime currently applicable to the authors, as outlined in their submission. Those amendments altered the conditions pursuant to which persons who have been the subject of non-release recommendations by their trial judges are eligible for parole. The regime in effect applies to nine offenders in total, including the authors. In 2006, the authors applied to the Court of Criminal Appeal for leave to further appeal their sentences on the basis of those legislative amendments. They put forward wide-ranging arguments, including that the non-release recommendation by Judge Newman had effectively become a new sentence, that they had been denied procedural fairness as a result of the legislative changes and that the legislation was constitutionally invalid. The Court refused leave to appeal. It acknowledged that the new sentencing regime meant that "it is much less likely that [the authors] will ever be released from prison than would have been the case" otherwise. However, it determined that the legislative changes were valid, as the Parliament of New South Wales had deliberately decided to create a stricter regime for offenders subject to non-release recommendations, in the knowledge that they comprised a small group of persons who had committed the most heinous crimes. As such, the Court considered that the creation of special parole conditions for those persons was not arbitrary or inherently unfair and that it was directly related to the gravity of their conduct.

4.6 The authors appealed this decision to the High Court of Australia, which dismissed their arguments. While noting that the legislative changes affecting the authors' sentences were several and unusual, the Court remarked that: "What must always be unknown to a sentencing judge ... are the paths that may be taken with respect to the status quo by future legislation. The subsequent legislation affecting the position of the appellants did not create any miscarriage of justice."

Claims under article 7

4.7 A sentence of life imprisonment only gives rise to a violation of article 7 if it is grossly disproportionate. The sentences imposed on the authors do not meet this threshold, even taking into account their status as juveniles and the principles enshrined in articles 37 (a) and (b), and 40 (1) of the Convention on the Rights of the Child. Furthermore, the authors have not been sentenced to life imprisonment without possibility of release.

4.8 Pursuant to sections 2 and 4 of Schedule 1 of the Crimes (Sentencing Procedure) Act 1999 (NSW), the authors may apply to the Supreme Court of New South Wales for the determination of a non-parole period for their sentence after they have served 30 years in prison, a period which will expire on 9 March 2020 for Mr. Blessington and on 9 September 2020 for Mr. Elliott. The Court may grant the application if it is satisfied that "special reasons" exist. In considering whether to grant an application, the Court must have regard to certain factors, as specified in section 7 of Schedule 1.⁷ Under Section 7 (3) of Schedule 1, the Court must also give substantial weight to, and consider adopting, any recommendations made by the sentencing judge. That would include the non-release recommendation made in respect of the authors. However, the Supreme Court remains at liberty to decline to adopt that recommendation. If the Court does not adopt a sentencing

⁷ According to Section 7, those factors include all of the circumstances surrounding the offence for which the sentence was imposed; any other offences of which the person has been convicted; any reports on the person made by the Serious Offenders Review Council and any other available and relevant reports prepared since their sentencing; the need to preserve the safety of the community; the age of the person; the level of culpability of the person and the heinousness of the offences.

recommendation, it must record its reasons for doing so. If the authors make an application for the determination of a non-parole period and it is unsuccessful, they may appeal the decision of the Supreme Court to the Court of Criminal Appeal of New South Wales.

4.9 The authors retain a real possibility of having a non-parole period set pursuant to that regime. The Court can take into account a range of mitigating factors, including the age of the authors and any rehabilitative progress made in prison. In particular, reports from the Serious Offenders Review Council take into account, inter alia, the classification and placement history of the offenders in prison; any compliance issues with their day-to-day management in prison; offences in custody; participation in prison programmes; and psychological and psychiatric assessments.

4.10 The question of whether the requirement for “special reasons” in Schedule 1 can be met was considered by the High Court of Australia in *Baker v. R*. The appellant Baker contended that the “special reasons” test was constitutionally invalid since no applicant could realistically succeed in meeting it. The Court dismissed that argument. Judge Gleeson held that “there is nothing unusual about legislation that requires courts to find ‘special reasons’ or ‘special circumstances’ as a condition of the exercise of a power. That is a verbal formula that is commonly used where it is intended that judicial discretion should not be confined by precise definition, or where the circumstances of potential relevance are so various as to defy precise definition”. The High Court in *Baker v. R* confirmed that each of the factors in section 7 may constitute special reasons for the granting of an application for a non-parole period, including the age of the offender at the time of the commission of the offence, as indicated by Judge Gleeson.

4.11 If the Supreme Court grants an application and a non-parole period is set, the authors may apply for release on parole at the expiry of that period to the New South Wales State Parole Authority, pursuant to section 154 A (3) of the Crimes (Administration of Sentences) Act 1999 (NSW). Under this provision, the Parole Authority must be satisfied that this is justified on the grounds that the offender is in imminent danger of dying, or is incapacitated to the extent that he or she no longer has the physical ability to do harm to any person and has demonstrated that he or she does not pose a risk to the community. The State party accepts that the legislative amendments that created this test have diminished the authors’ prospects of release on parole, but it remains nevertheless a realistic possibility.

4.12 The State party further submits that the authors enjoy the possibility of release pursuant to the royal prerogative of mercy or, alternatively, under section 76 of the Crimes (Appeal and Review) Act 2001 (NSW). The royal prerogative of mercy is an unfettered discretionary power that the Governor of New South Wales may exercise. While the prerogative is usually exercised in cases involving non-violent offences, there is one example in which the Governor granted release on parole to a person convicted of murder, having regard to the exceptional compassionate circumstances of the case. The availability of the royal prerogative of mercy renders the authors’ claim in relation to article 7 unmeritorious.

4.13 If the Committee decides to characterize the sentencing regime applicable to the authors as being without possibility of parole, the State party submits that although the conditions of parole applicable to the authors were altered, their sentence of life imprisonment was imposed on them at the outset. Judge Newman was not required to impose a life sentence, but he did so after careful consideration of mitigating factors, including the age and troubled backgrounds of the authors. Furthermore, his non-release recommendation indicated his measured view that the continued incarceration of the authors well into the future (and possibly for most of their natural lives) might serve legitimate penological purposes. Their imprisonment cannot be characterized as grossly disproportionate while the 30-year minimum term is yet to be served in full.

4.14 The State party acknowledges that it is possible that the authors may serve the remainder of their lives in prison if they are not released either on parole or pursuant to the royal prerogative of mercy. However, this does not render their sentence in violation of the Covenant. The test is whether realistic avenues for release exist in law and in fact.

4.15 While age must be taken into account in determining whether a particular sentence is grossly disproportionate or sufficient to give rise to cruel, inhuman or degrading treatment or punishment, the imposition of a life sentence on a juvenile with limited prospects for release will not necessarily breach article 7 of the Covenant. The question is whether the high threshold set for release is appropriate, having regard not only to the age of the authors, but also the circumstances of the offence, the need for retribution and deterrence and the need for protection of the community. It is the view of the State party that the sentences imposed on the authors strike an appropriate balance in that regard.

Claims under article 10, paragraph 3

4.16 The treatment of the authors in prison is consistent with this provision, as they have benefited substantially from prison programmes and policies, which further their personal development, encourage social contact with the outside world and provide skills, which would assist in their reintegration into the community if released. The nature of their sentences does not deprive their treatment in prison of that rehabilitative character. The authors have access to the standard services available to other inmates, including welfare, chaplaincy, psychology and drug and alcohol rehabilitation services. They have access to a controlled telephone system through which they may contact family and friends, in addition to agencies such as the Ombudsman of New South Wales and legal aid. They can also communicate freely via letters, and have visits from family, friends and legal representatives.

4.17 As indicated by the authors, they have made use of prison programmes and services and work opportunities, and participated in communal activities and assisting prison authorities. For instance, Mr. Blessington has participated in courses to improve his literacy and numeracy and on cooking and kitchen work. He has been employed as a sweeper. He has also participated in a sex offender programme and drug and alcohol courses. Mr. Elliot has worked as a librarian and as part of a maintenance crew. He has completed qualifications in carpentry and joinery, and undertaken studies in advanced building techniques and information technology. He has participated in drug and alcohol courses and programmes on conflict resolution, communication skills, art and music.

4.18 Article 10, paragraph 3, of the Covenant is directed at ensuring respect for the inherent dignity of detained persons, regardless of how soon they may be released from detention. The high threshold applicable for the release of the authors on parole does not deprive their treatment in prison of its essentially reformatory and rehabilitative character. If the authors' sentences were deemed relevant in this respect, the State party submits that it is permissible for States to weigh the aim of rehabilitation against the legitimate interests of adequate punishment, public safety and deterrence. That position holds, notwithstanding the status of the authors as juveniles at the time of their offences.

4.19 The authors' sentences are consistent with relevant internationally accepted minimum standards. Thus, rule 17.1 (a) of the United Nations Standard Minimum Rules for the Administration of Justice (the Beijing Rules), which contains guiding principles on adjudication and disposition, stipulates that a sentence imposed on a juvenile must be in proportion not only to "the circumstances and the needs of the juvenile", but also to "the circumstances and gravity of the offence" and the "needs of the society". The commentary

to the Beijing Rules recognizes that retribution may be a permissible aim in sentencing juveniles in respect of severe offences.⁸ In addition, in light of the extremely serious nature of the authors' crimes, their sentences are not inconsistent with the principles in the Convention on the Rights of the Child and the Beijing Rules that maintain that the imprisonment of minors should only be a measure of last resort and endure for the minimum period necessary.⁹

4.20 The State party adheres firmly to the principle in article 10, paragraph 3, of the Covenant that the essential aims of incarceration are both to reform and to rehabilitate criminal offenders so that they can resume their role as members of society. However, apart from those essential aims, incarceration also serves to protect the community from offenders with violent tendencies and to punish serious wrongdoing, with a view not only to reformation of the individual but also to deterring those who would commit similar crimes. Article 10, paragraph 3, does not prevent Governments and courts from imposing penalties that aim at adequate punishment, community protection and deterrence, as they see fit in appropriate circumstances.

Claims under article 15, paragraph 1

4.21 The legislative amendments regarding eligibility for parole (including the setting of a non-parole period) affecting the authors are not a "penalty" for the purposes of article 15 of the Covenant, since those amendments did not affect the punishment at law applicable to their offences, which was life imprisonment. The authors cannot demonstrate that the currently applicable regime necessarily results in them spending longer in prison than the original regime, and thus that they are subject to a "heavier" penalty in their present circumstances.

4.22 The State party observes that in previous jurisprudence the Committee has not made a final determination on the scope of the term "penalty" in article 15, a task which the Committee described in *Van Duzen v. Canada* as raising "complex issues".¹⁰ The difficulty arises because parole does not form part of the "penalty" or sanction imposed by law, but is by nature a discretionary and flexible component of the way in which the sentence is served. The word "penalty" in article 15, paragraph 1, refers to the punishment or sanction at law for an offence at the time of its commission. The second sentence of that paragraph applies to situations where a person has suffered an increase in the punishment that can be imposed by a court according to the law (relative to the position at the time of the offence). Changes to eligibility for the fixing of a non-parole period or release on parole do not reduce the punishment or sanction at law. Parole is a procedural aspect of the sentence dictating how it will be served. It concerns the means of administration of the penalty imposed at sentencing, which can result in part of the sentence being served in the community on certain conditions, rather than in custody. Release on parole in Australia is not automatic and is not an entitlement or benefit accruing to a prisoner.

4.23 The legislation applicable at the time of the offences would have permitted the authors to apply to the Executive for release on licence.¹¹ The legislation applicable at the time they were sentenced would have permitted them to apply to the Supreme Court of

⁸ According to the Commentary on Rule 17 "Whereas in adult cases, and possibly also in cases of severe offences by juveniles, just desert and retributive sanctions might be considered to have some merit, in juvenile cases such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person."

⁹ Article 37 (b) of the Convention on the Rights of the Child and rule 19 of the Beijing Rules.

¹⁰ Communication 50/1979, *Van Duzen v. Canada*, Views adopted on 7 April 1982, paragraph 10.3.

¹¹ Crimes Act 1900 (NSW), section 463 (1), subsequently repealed.

New South Wales for a determination of their sentence after eight years.¹² However, as a result of the amendments the authors must now wait 30 years before applying for determination of their sentences, which may then result in a non-parole period being set. Those amendments do not change the punishment or sanction at law applicable to the offence of murder when committed by juveniles. As affirmed by the Court of Criminal Appeal, the amendments did not alter the nature of the sentence to life imprisonment. Furthermore, it cannot be said definitively that the authors would necessarily have been released earlier under either the scheme applicable at the time of the offences, or that applicable at the time they were sentenced.

4.24 The validity of the changes to parole conditions was challenged before the High Court again more recently in the case of *Crump v. New South Wales* by an offender in respect of whom a non-release recommendation had been made at the time of sentencing. The plaintiff argued that section 154 A of the Crimes (Administration of Sentences) Act 1999 was invalid since it purported to alter the effect of the judicial determination in 1997 which rendered him eligible for parole in 2003. The High Court unanimously dismissed the case. According to the judges, the “practical reality” is that “legislative and administrative changes in parole systems” occur and the 1997 order did not “create any right or entitlement in the plaintiff to his release on parole”. Chief Justice French observed that “the executive decision to release or not to release a prisoner on parole may reflect policies and practices which change from time to time. There nevertheless remains only one judicial sentence”.

4.25 The practice of making non-release recommendations has a long history in Australia. It arose precisely because judges were aware of the administrative practice of releasing prisoners on parole. In the case of the authors, Justice Newman’s recommendation was made for the purpose of it later being taken into account in any decisions regarding eligibility for release. It may be assumed that his recommendation would have been given weight in any application by the authors for determination of sentence or release on parole.

4.26 The State party contests the authors’ submission that there is no requirement for them to demonstrate that they have necessarily been subject to a longer term in prison under the new laws. There is no ground upon which to conclude that the authors have suffered an increased punishment or sanction as a result of the legislative amendments. The jurisprudence of the Committee indicates its general reluctance to engage in speculative exercises in an attempt to divine whether a person’s position may have been more advantageous under previously applicable legislation. Consistent with that jurisprudence, it is not the function of the Committee in the present communication to make a hypothetical assessment of whether or not the authors might have been released earlier if the legislative amendments had not taken place.

Claims under article 24, paragraph 1

4.27 The State party has a wide range of legislative and other measures in place to ensure that children are protected by their families, society and the State. That includes measures to ensure that the criminal justice system affords appropriate protection to juveniles, such as special procedures regarding pretrial detention, trial and imprisonment. In the present case, the authors commenced their term of imprisonment in a juvenile institution and were transferred to adult institutions after attaining 18 years of age. Their youth and the importance of their rehabilitation was a primary consideration in their sentencing. The authors do not claim that the New South Wales criminal justice system contained any deficiencies which resulted in a failure to protect their rights throughout their pretrial

¹² Sentencing Act 1989 (NSW), section 13A, subsequently repealed.

detention, trial, appeals or subsequent imprisonment. Nor is there any suggestion that the State party has failed to take the general measures of protection it considers appropriate with respect to children, or has failed to intervene when the family has failed in its duties. In the absence of a breach of another article in the Covenant which would indicate that the State party has failed to take such measures of protection as are required by the authors' status as minors and in the absence of any suggestion that there has been a failure to take other general measures of protection appropriate to the needs of children, a breach of article 24, paragraph 1 should not arise.

4.28 Concerning the authors' reference to article 37 (a) of the Convention on the Rights of the Child, the State party submits that allegations made by the authors claiming a stand-alone breach of article 24, paragraph 1, which seek to import obligations from the Convention more properly directed at interpretation of substantively parallel articles of the Covenant, should be considered in relation to allegations of breach of those articles, rather than directly considered at first instance in relation to article 24, paragraph 1.

Authors' comments on the State party's observations

5.1 On 6 September 2012 the authors provided comments on the State party's observations.

Claims under article 7

5.2 The authors argue that, to their knowledge, no person the subject of a "non-release recommendation" has ever been released. That was the purpose of the amendments to the law. Although the amended legislation maintains the technical possibility of release, that is limited to the authors being on their deathbeds or severely incapacitated. Hence, such a possibility should be treated as no possibility at all. Further, if the authors were paroled on their deathbeds but then somehow recovered, they would be liable to have their parole revoked, in accordance with section 170 (1) (a1) of the Crimes (Administration of Sentences) Act 1999 (NSW).

5.3 As to the possibility of release pursuant to the royal prerogative of mercy, the authors state that the power to grant mercy has only been used once in New South Wales in respect of a person convicted of murder. That is the case the State party referred to, which concerned a woman who murdered her husband after suffering protracted domestic violence. Properly understood in the political-legal context of New South Wales and in light of the authors' status as children, the mere technical prospect of either author ever receiving the royal prerogative of mercy is not sufficient to convert what would otherwise be cruel, inhuman or degrading treatment into treatment that is compliant with article 7.

5.4 For any child sentenced to life imprisonment, the possibility of release must be "realistic and regularly considered", as indicated by the Committee on the Rights of the Child.¹³ New South Wales law as it stands precludes the authors from seeking a determination of the indefinite life sentences until they have been in prison for 30 years. Hence, in addition to not being realistic, the possibility of their release is not regularly considered.

5.5 It is common ground that sentencing children to life without the possibility of release is a breach of article 7. Such sentences are cruel and inhuman when imposed on a child because, among other things: (a) child offenders have a lower culpability than adult offenders; (b) children have greater prospects for rehabilitation; and (c) life sentences

¹³ Committee on the Rights of the Child general comment No. 10 (2007) on children's rights in juvenile justice, para. 77.

impact disproportionately on children relative to adults. A life sentence with only the remote, technical possibility of release is cruel and inhumane for precisely the same reasons. The authors' remote chances of release on their deathbeds, in the event of serious physical incapacity, or upon the discretionary exercise of a scarcely exercised executive power, does not render humane what would otherwise be cruel and inhuman.

Claims under article 10, paragraph 3

5.6 The authors reiterate that their lifelong incarceration is in violation of article 10, paragraph 3. A rehabilitative process has release and reintegration as its destination or end point. Hence, they are not on a rehabilitative path towards release because they will never be released (unless terminally ill or severely physically incapacitated). The sentencing law reforms complained of deprive the treatment of the authors of any rehabilitative character. Their incarceration serves only punitive ends.

Claims under article 15, paragraph 1

5.7 In the interest of purposive interpretation and giving practical content to the protection in article 15, the Committee should evaluate the true nature, effect and intent of the retrospective legislative changes cementing the authors in their cells. Whether the laws are retrospectively punitive should be a question of substance and intent, not form. The legislative changes complained of violate the letter and spirit of the protection against retrospective criminal punishment for the following reasons.

5.8 First, at the time of the offence and sentence, the authors had prospects for release that were realistic and would be regularly considered. In particular, the authors were able to apply for a determination of their life sentence after serving eight years in prison. While it is not possible to predict when the authors would have been released under the regime applicable at the time it is clear that the authors had a realistic chance of release within their natural lives. The mean time served by persons subject to life sentences in New South Wales between 1981 and 1989 before release on license was 11.7 years.

5.9 Secondly, there is no doubt that the legislature of New South Wales mounted a concerted campaign over several years to remove any meaningful prospect for the release of the authors. The then Premier of New South Wales made statements in Parliament and to the media that the laws aimed to ensure that the authors would never be released from custody. Further, the Government of New South Wales has repeatedly acted to extinguish any prospect for the release of the authors whenever it has become apparent that existing legislation fails to do so. For instance, in 1996, eight years after beginning his sentence, Mr. Blessington sought a redetermination. The Supreme Court of New South Wales found that he was not affected by the new, more punitive sentencing laws targeted at him because his application was already on foot at the time of their commencement.¹⁴ The Court suggested that given the legal consequences that now flowed from the trial judge's comment that he should never be released, that comment could be challenged in the superior courts as manifestly excessive when made in respect of 14 and 16-year-old children. Alternatively, the challenge could be based on the fact that the authors had been denied any real opportunity to make submissions on the comment, because it was uttered at a time when it was of no legal consequence. In response to that judgement, the Government of New South Wales promptly passed further reforms making it clear that the laws applied to any applications already on foot. The sole consequence of that further amendment was to delay the consideration of Mr. Blessington's application for a determination of his sentence for over two decades. Reforms were also passed amending the definition of "non-release

¹⁴ *R v. Bronson Mathew Blessington*, 2005.

recommendation” to include “any such recommendation, observation or expression of opinion that (before, on or after the date of assent to the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005) has been quashed, set aside or called into question”. Those amendments deprived any successful appeal of relevance. The trial judge’s comment in obiter would remain the legislative trigger for punitive consequences, even if quashed by a superior court.

5.10 Thirdly, the trial judge’s comment that the authors should never be released has been ex post facto transformed into the criterion on which the authors (and a handful of other named prisoners) are treated much more punitively than all other persons given life sentences in New South Wales and much more punitively than they would have been under the laws in force at the time of their offence. This is so, despite the fact that the comment: (a) was criticized by superior courts; (b) cannot be appealed or challenged; (c) was made without any statutory basis; (d) was made at a time when it was of no legal consequence; (e) was made by a judge who could not have known the strict legal consequences that would flow from it; and (f) was made without the opportunity for the authors to make submissions on the issue.

5.11 Fourthly, the situation of the authors is quite analogous to that of a person subject to a retrospective increase in the prescribed minimum sentence. A retrospective increase in the minimum sentence is unequivocally a breach of article 15 of the Covenant. A minimum sentence sets the date before which the person subject to it cannot seek release. At the time of sentence, the authors could seek a determination of the sentence after eight years. They must now wait at least 30 years. In theory, their sentence may have been redetermined to provide for the earliest possible release date. It is impossible to know, much the same as it is impossible to know whether a person subject to a retrospective increase in their minimum sentence would have been released immediately upon serving their initial minimum term. The situations are analogous and should be treated as such.

Claims under article 24, paragraph 1

5.12 The authors argue that they do not rely on the text of the Convention on the Rights of the Child being wholly transplanted into the provisions of the Covenant. Rather, the Convention plays an important role in interpreting the scope of obligation in article 24, paragraph 1, as do customary international law and the Beijing Rules. The rights in the Convention also inform the scope of articles 10 and 7 of the Covenant. Articles 37 (a) and (b) and 40, paragraph 1, of the Convention are particularly relevant in that respect. Human rights instruments should be construed in a way that is interdependent and mutually reinforcing.

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 case is admissible under the Optional Protocol to the Covenant.

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

6.3 The Committee notes the statement of the State party that it does not challenge the admissibility of the communication. The Committee considers that all admissibility criteria have been met, declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The authors claim that their rights under article 7 of the Covenant were violated, as the imposition of a life sentence on a juvenile constitutes cruel, inhuman and/or degrading punishment and that the legislation applicable to them does not offer a real possibility of release on parole. The State party argues that the sentences imposed on the authors are proportionate to their crimes, to the need for retribution, to deterrence and to protection of the community; and that possibilities of release exist under the Crimes (Sentencing Procedure) Act 1999 and the Crimes (Administration of Sentences) Act 1999, as well as under the royal prerogative of mercy.

7.3 The authors further claim that their life sentence is incompatible with the requirements under article 10, paragraph 3, of the Covenant that the essential aims of the penitentiary system be reformation and social rehabilitation, and that juvenile offenders be accorded treatment appropriate to their age and legal status. The State party argues in this respect, inter alia, that article 10, paragraph 3, does not prevent Governments and courts from imposing penalties that aim at adequate punishment, community protection and deterrence, as they see fit in appropriate circumstances.

7.4 The authors claim that the State party, by enacting the legislative amendments regarding eligibility for parole after the offence was committed in 1988 and after their sentence dated 18 September 1990, breached article 15, paragraph 1, of the Covenant, because those amendments resulted in removing the prospect of their release on parole and hence in a heavier penalty than the one applicable when the criminal act was committed. The State party contests this claim arguing that parole does not form part of the penalty or sanction imposed by law, but is by nature a discretionary and flexible component of the way in which the sentence is served.

7.5 The authors finally claim that the imposition of a life sentence without possibility of parole for crimes they committed as juveniles is incompatible with the obligations of the State party under article 24, paragraph 1, of the Covenant. The State party argues in that respect that its criminal justice system affords appropriate measures of protection to juveniles, in application of which the authors commenced their term of imprisonment in a juvenile institution and were transferred to adult institutions after attaining 18 years of age.

7.6 The Committee notes that, as a result of the application of Schedule 1 of the Crimes (Sentencing Procedure) Act 1999 and subsequent legislation, the authors must serve 30 years of their life sentences before they can apply for a determination of their sentence; that such determination would be limited to setting a non-parole period; and that upon completion of the non-parole period, the New South Wales State Parole Authority could only release the authors if they are either in imminent danger of dying or physically incapacitated.

7.7 The Committee considers that the imposition of life sentences on the authors as juveniles can only be compatible with article 7, read together with articles 10, paragraph 3, and 24 of the Covenant if there is a possibility of review and a prospect of release, notwithstanding the gravity of the crime they committed and the circumstances around it. That does not mean that release should necessarily be granted. It rather means that release should not be a mere theoretical possibility and that the review procedure should be a thorough one, allowing the domestic authorities to evaluate the concrete progress made by the authors towards rehabilitation and the justification for continued detention, in a context that takes into consideration the fact that they were 14 and 15, respectively, at the time they committed the crime.

7.8 The Committee notes that the review procedure in the case of the authors is subjected, through various amendments of the relevant legislation, to such restrictive conditions that the prospect of release seems extremely remote, also bearing in mind the “never to be released” recommendation made by Justice Newman of the Supreme Court of New South Wales on 18 September 1990. Furthermore, the release, if it ever took place, would be based on the impending death or physical incapacitation of the authors, rather than on the principles of reformation and social rehabilitation contained in article 10, paragraph 3, of the Covenant. In that respect, the Committee recalls its general comment No. 21 (1992), in which it indicated that no penitentiary system should be only retributory and that it should essentially seek the reformation and social rehabilitation of the prisoner. The Committee emphasizes that this principle applies with particular force in connection with juveniles.

7.9 The Committee notes the observations provided by the State party regarding the fact that the authors have benefited substantially from prison programmes and policies designed to further their personal development, encourage social contact with the outside world and provide skills which would assist in their reintegration into the community if released (see paras. 4.16 and 4.17 above). The Committee notes in that regard that the State party has not put forward any argument suggesting that rehabilitation would not succeed in the case of the authors, based, for instance, on psychological and psychiatric assessments of them.

7.10 The Committee notes the argument of the State party, in connection with article 24 of the Covenant, that its criminal justice system provides appropriate protection to juveniles, including special procedures regarding pretrial detention, trial and imprisonment. The Committee does not question the existence of such measures of protection and their application to the authors at the time of the trial and during the first years of their imprisonment. However, as for articles 7 and 10, paragraph 3, the main claim under article 24, paragraph 1, of the Covenant remains the imposition of life sentences on the authors without real possibility of release.

7.11 Article 24, paragraph 1, of the Covenant requires that States parties afford children such measures of protection as are required by their status as minors. That provision takes into account the vulnerability and immaturity of children, as well as their capacity for development. The entitlement of children to special consideration also informs article 10, paragraphs 2 (b) and 3, and article 6, paragraph 5, of the Covenant, which prohibits the imposition of death sentences for crimes committed by persons below eighteen years of age. The Committee considers that treating juvenile offenders in a manner appropriate to their age and legal status precludes a definitive conclusion that a juvenile’s actions make that person incapable of rehabilitation and undeserving of release, regardless of any future personal and social development, for the entire length of a lifetime. The Committee recalls in that regard article 37 (a) of the Convention on the Rights of the Child, which stipulates that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” While the main role of the Committee is to monitor the implementation of the Covenant, the Committee considers this provision, which is included in a treaty that has been ratified or acceded to almost universally, including by the State party, as a valuable source informing the interpretation of the Covenant in the present case.

7.12 Taking into account the lengthy period prescribed before the authors are entitled to apply for release on parole, the restrictive conditions imposed by the law to obtain such release and the fact that the authors were minors at the time they committed their crimes, the Committee considers that the life sentences, as currently applied to the authors, do not meet the obligations of the State party under article 7, read together with articles 10, paragraph 3, and 24 of the Covenant. Having reached that conclusion the Committee will not examine the claims of violation of article 15, paragraph 1.

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 State party has violated the authors' rights under articles 7, 10, paragraph 3, and 24 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 authors with an effective remedy, including compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should review its legislation to ensure its conformity with the requirements of article 7, read together with articles 10, paragraph 3, and 24 of the Covenant without delay, and allow the authors to benefit from the reviewed legislation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized 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 recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, 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. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.
