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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 32/2016 concerning Gary Maui Isherwood (New Zealand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 7 April 2015 the Working Group transmitted a communication to the Government of New Zealand concerning Gary Maui Isherwood. The Government replied to the communication on 7 July 2015. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

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(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Isherwood is a 38-year-old national of New Zealand currently detained at Christchurch Men's Prison. On 18 November 1999, Mr. Isherwood was sentenced to eight years of imprisonment for three offences: (a) sexual intercourse with a female aged 12-16; (b) living off the earnings of prostitution; and (c) administering morphine.

5. On 1 July 2003, Mr. Isherwood was released on parole. Two weeks later, on 15 July 2003, he committed five additional offences: (a) sexual violation by rape of a female over 16 (three counts); (b) sexual violation by unlawful sexual connection with a female over 16 (four counts); (c) kidnapping (one count); and (d) two drug-related offences. On 21 April 2004, Mr. Isherwood was sentenced to preventive detention for a minimum period of imprisonment of 10 years on each charge under section 87 of the Sentencing Act 2002.

6. In 2004, Mr. Isherwood appealed against his convictions, but not the sentences imposed. On 14 March 2005, his appeal was dismissed. In 2010, Mr. Isherwood's application for leave to appeal that decision, and to appeal his original sentence, was dismissed.

7. On 3 August 2010, the Court of Appeal quashed the sentence for the two drug-related offences because they were not offences for which the High Court had power to impose preventive detention under the Sentencing Act 2002, and substituted finite sentences of four years of imprisonment for both offences. However, the Court of Appeal upheld the sentences of preventive detention in relation to Mr. Isherwood's offences involving sexual violation and kidnapping. On 21 September 2010, Mr. Isherwood's application for leave to appeal that decision was dismissed.

8. On 21 April 2014, Mr. Isherwood completed the minimum period of 10 years of imprisonment without parole. On 30 April 2014, the New Zealand Parole Board denied Mr. Isherwood parole. When the source submitted this case to the Working Group in January 2015, Mr. Isherwood had been in detention for a period of 10 years and 8 months. He has completed the punitive period of his detention and is currently in preventive detention.

Submissions regarding arbitrary detention

9. The source submits that Mr. Isherwood's detention was arbitrary from the time he was sentenced in 2004, as well as since April 2014, when he commenced the period of preventive detention. The source refers to the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person (article 9 of the Covenant), in paragraph 12 of which the Committee states that:

An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

10. The source argues that Mr. Isherwood's detention, other than that imposed for a finite term, was arbitrary from the start, as it does not meet the Committee's requirements of reasonableness, necessity and proportionality.

11. In addition, the source recalls the statement made by the Working Group at the conclusion of the visit it conducted to New Zealand from 24 March to 7 April 2014, in which the Working Group expressed particular concerns over the widespread availability of preventive detention since the enactment of the Sentencing Act 2002. The Working Group restates its view, also shared by the Committee,¹ that:

When a criminal sentence includes a punitive period followed by a preventive period, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the preventive detention must be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to determine the continued justification of the detention.

Detention conditions must be distinct from the treatment of convicted prisoners serving a punitive sentence and be aimed at the detainees' rehabilitation and reintegration into society. If a prisoner has served the sentence imposed at the time of conviction, international law prohibits equivalent detention under the label of civil preventive detention. The grounds for detention must be defined with sufficient precision to avoid overly broad or arbitrary application.²

12. The source refers to the requirements of international law set out in the statement of the Working Group and submits that they have not been met because:

(a) The preventive period of Mr. Isherwood's detention has not been justified by compelling reasons;

(b) Regular periodic reviews of Mr. Isherwood's detention by an independent body have not taken place;

(c) The conditions of Mr. Isherwood's detention are not distinct from those of convicted persons serving a punitive sentence, nor are they aimed at his rehabilitation and reintegration.

13. In support of this argument, the source refers to the 2004 annual report of the Working Group (see E/CN.4/2005/6, para. 58 (f)):

Decisions on psychiatric detention should avoid automatically following the expert opinion of the institution where the patient is being held, or the report and recommendations of the attending psychiatrist. Genuine adversarial procedure shall be conducted, where the patient and/or his legal representative are given the opportunity to challenge the report of the psychiatrist.

14. The source alleges that, contrary to those requirements, the New Zealand Parole Board has not analysed the legality of the continued detention of Mr. Isherwood but has relied exclusively on the psychological report of one expert finding that he poses too high a risk to be released on parole. By using this vague risk assessment or suspicion that Mr. Isherwood might reoffend, the Parole Board has shown that it has no real intention of releasing inmates held in preventive detention. According to the source, the detention of a drug-dependent person (someone whose drug addiction is the primary factor behind all of his offending) beyond the punitive period because society does not know what else to do

¹ See general comment No. 35, paras. 21 and 22.

² The full text of the statement is available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14563&LangID=E.

with him or her falls radically short of a proper and full consideration of Mr. Isherwood's prolonged detention. The source adds that Mr. Isherwood has not been treated with inherent respect and dignity.

15. Furthermore, the source claims that, since the expiry of his original sentence in May 2014, Mr. Isherwood is still being detained in prison under punitive conditions. The source states that there is no plan for Mr. Isherwood's integration or rehabilitation, nor is it known when he will be receiving the psychological care provided for by law. As a result, the conditions under which Mr. Isherwood is currently detained are the same as those before May 2014, when his sentence became preventive. The source argues that there are less restrictive and more humane alternatives to prison, and submits that Mr. Isherwood's ongoing detention despite these alternatives and because it is suspected that he might reoffend, is punitive.

16. Finally, the source considers that, in order to be treated with humanity and respect for his inherent dignity, Mr. Isherwood must be placed in a facility that addresses his needs and provides him with an opportunity for rehabilitation and reintegration into the community. The source alleges that Mr. Isherwood's anxiety should have been treated before his drug addiction but was not, and that this set him up for failure. The source also claims that Mr. Isherwood's treatment in a drug unit has been unnecessarily delayed and was not a realistic option. The source notes that, according to the psychological report to the New Zealand Parole Board of 21 March 2014, Mr. Isherwood had been identified as suitable for participation in a special treatment unit programme but that it had not yet been determined which programme, if any, would be the most appropriate for him. The source emphasizes that the failure to identify a treatment programme for Mr. Isherwood is arbitrary, given that he has already served over 11 years of his sentence and will not be released without receiving treatment. The source also argues that the Parole Board has not taken into account Mr. Isherwood's ability to cope with indefinite detention and that there is no programme available in New Zealand prisons to address the potentially harmful effects of long-term imprisonment.

17. For these reasons, the source submits that the detention of Mr. Isherwood violates articles 3, 9 and 10 of the Universal Declaration of Human Rights and articles 9 (1) and (4), 10 (1) and (3) and 14 (7) of the Covenant, and is arbitrary according to categories I and III of the categories applied by the Working Group.

Response from the Government

18. On 7 April 2015, the Working Group transmitted the allegations from the source to the Government of New Zealand under its regular communications procedure, requesting the Government to provide detailed information by 8 June 2015 about the current situation of Mr. Isherwood and to clarify the legal provisions justifying his continued detention. On 26 May 2015, the Government sought an extension of 30 days, until 8 July 2015. The extension was sought in accordance with paragraph 16 of the methods of work of the Working Group.

19. In its response of 7 July 2015, the Government submits that Mr. Isherwood's detention is not arbitrary, arguing that the issues of reasonableness, necessity and proportionality of his preventive sentence are issues that may be addressed on appeal to the Court of Appeal to ensure that the sentence is imposed only when appropriate. In the present case, Mr. Isherwood was sentenced to preventive detention because he posed a very high risk to public safety, and this was the subject of the appeal by Mr. Isherwood. The Government also refers to the view expressed by the Committee that preventive detention is

not arbitrary per se, provided that it is justified by compelling reasons and subject to review by a judicial authority.³

20. The Government states that Mr. Isherwood's ongoing detention is reviewed annually⁴ by the New Zealand Parole Board, an independent body which is itself subject to judicial review. The Government refers to provisions under the Parole Act 2002 that ensure that decisions by the Parole Board are made fairly and transparently. This includes providing offenders with information that is considered by the Parole Board prior to the hearing, allowing the offender to have legal representation and requiring that decisions be made in writing and that reasons be given for the decision.

21. The Government notes that, on 21 April 2015, the New Zealand Parole Board held a second hearing in relation to Mr. Isherwood, as a result of which it determined that he continued to pose an undue risk to public safety and therefore could not be released on parole. According to the Government, that assessment was made using a robust process that relied upon a psychological assessment of risk and reflected international best practice. The Government notes that Mr. Isherwood had an opportunity to file submissions before the Parole Board to challenge the risk assessment made in relation to his case and to seek judicial review but did not do so.

22. Furthermore, the Government submits that Mr. Isherwood is not subject to double punishment as he continues to serve the sentence that was imposed at the time of his conviction. In addition, under New Zealand law, sentences are not divided into "punitive" and "non-punitive" periods. The Department of Corrections manages Mr. Isherwood's sentence consistently with the purposes of the corrections system, which include providing activities for rehabilitation and reintegration in so far as is reasonably practicable and within available resources.

23. The Government claims that Mr. Isherwood has received, and continues to receive, an array of opportunities and services that work towards his rehabilitation, including being employed in the prison, pastoral care, psychological support and participation in courses. The Government notes that, in January 2013, prior to the completion of his minimum non-parole period in April 2014, Mr. Isherwood commenced a drug treatment programme. In April 2013, Mr. Isherwood was removed from the programme because he failed a drug test. Mr. Isherwood commenced the programme for a second time in February 2014 but was reported to have engaged in disrespectful behaviour and elected to leave the programme in March 2014. In September 2014, a team overseeing Mr. Isherwood's situation suggested that he complete the programme in another region, where he might be provided with a more constructive environment, one that might have assuaged some of the behavioural issues and disruptive tendencies associated with Mr. Isherwood maintaining a profile at Christchurch Men's Prison. Mr. Isherwood refused that option, however, as he would have been distanced from his social support network. Since June 2015, Mr. Isherwood has been on the waiting list to enter the drug treatment programme for a third time.

24. The Government notes that, while States have a duty to provide the assistance necessary to allow detainees to be released as soon as possible, an offender may contribute to delaying the date of his or her release.⁵ The Government argues that the Department of Corrections has offered Mr. Isherwood a significant opportunity to reduce the risk of reoffending but that, owing to his own behaviour and decisions, progress has been delayed.

³ See communication No. 1512/2006, *Dean v. New Zealand*, Views adopted on 17 March 2009, para. 7.4.

⁴ The Government notes that, in line with new legislation, review by the New Zealand Parole Board takes place every two years from September 2015.

⁵ See *Dean v. New Zealand*, para. 7.5.

25. Furthermore, in relation to allegations by the source that the detention of Mr. Isherwood violates article 10 (3) of the Covenant, the Government submits that that provision does not confer on prisoners the right to participate in specific rehabilitation programmes and that the means by which rehabilitation is achieved in the penitentiary system is at the discretion of the State.

Further comments from the source

26. The Government's response was sent to the source on 8 July 2015 for comment. The source replied on 10 August 2015.

27. The source does not dispute the fact that Mr. Isherwood's case warranted a substantial finite sentence but argues that Mr. Isherwood is being subjected to an indeterminate sentence from which it is difficult, if not impossible, to seek release, given the arbitrary way in which the preventive sentence has been administered.

28. The source challenges four of the Government's arguments, as follows:

(a) Mr. Isherwood's rehabilitation was provided primarily after the expiry of his punitive period of imprisonment and the resource-driven provisions of New Zealand law, which delay treatment, are contrary to international human rights law, including articles 9 (1) and (4), 10 (3) and 26 of the Covenant;

(b) The lack of a distinction in New Zealand between "punitive" and "non-punitive" periods of imprisonment is mere semantics (a minimum period of imprisonment without parole and a punitive period amount to the same thing), and international human rights law makes such a distinction;

(c) Mr. Isherwood's original sentencing and the determination of his risk by the New Zealand Parole Board was arbitrary, as it is not possible to accurately determine a very high risk, nor the actual risk of any particular individual;

(d) The New Zealand Parole Board is not independent.

29. The source makes comments on a number of factual inaccuracies in the Government's response. Some of the comments relate to disputed details of Mr. Isherwood's case that have been taken into account by the Working Group but are not repeated in detail here.⁶ The most significant of the alleged inaccuracies relates to the Government's claim that Mr. Isherwood failed to complete drug treatment on two occasions. The source states that Mr. Isherwood was removed from the drug treatment programme because his medications had been stopped owing to a confusion relating to the prescriptions. According to the source, Mr. Isherwood unlawfully self-medicated, but later stabilized when he went back on his previous medications. On the second occasion, Mr. Isherwood removed himself from the programme when another withdrawal of his medication led to erratic behaviour. The source notes that Mr. Isherwood was offered another opportunity to participate in the programme in another region but declined because he did not want to be relocated to a place where he would have no support, particularly given that he suffers from anxiety, and that he has fulfilled the requirements to complete the programme at his local prison. The source therefore disputes the Government's assertion that Mr. Isherwood is delaying his own rehabilitation.

⁶ For example, the source: (a) provided clarifications on a painting and paper-hanging course that Mr. Isherwood completed; (b) corrected a finding by the psychologist that since Mr. Isherwood was appealing his conviction he might not be able to complete a sex offender course, noting that participation in the course should not have been placed on hold owing to the appeal; and (c) clarified that Mr. Isherwood's security classification is low-to-medium and that his motivation to participate in activities is average.

30. The source also notes that Mr. Isherwood is again on the waiting list for drug treatment because of systemic underfunding by the Government for rehabilitative treatment. The lack of resources provided by the Government has resulted in Mr. Isherwood starting treatment primarily after the minimum period of imprisonment without parole had expired. As a result, Mr. Isherwood did not have a fair chance of being released at the first possible opportunity, in April 2014, contrary to articles 10 (3) and 26 of the Covenant. In relation to article 26, the source alleges that inmates in preventive detention, like Mr. Isherwood, are discriminated against when it comes to access to treatment, as they should receive treatment before prisoners serving finite sentences but do not.

31. The source also refers to the Government's assertion that Mr. Isherwood has received, and continues to receive, an array of opportunities and services that work towards his rehabilitation. While this is literally correct, the source argues that he has not received timely and appropriate treatment for sex- and drug-related issues. The source also points to an inconsistency between the Government's reply and the information in the 2015 Department of Corrections report to the New Zealand Parole Board regarding whether Mr. Isherwood was receiving chaplaincy and counselling support. The source argues that the inconsistency shows a lack of good faith, as the Government uses that support to show that it has offered rehabilitation opportunities to Mr. Isherwood, while advising the Parole Board that the counsellor and the chaplain are not involved in his support.

32. Furthermore, the source comments on a statement by the Government that Mr. Isherwood did not seek parole in 2014. According to the source, no application for parole was necessary given that, in line with a statutory requirement of the Parole Act 2002, the New Zealand Parole Board should consider granting offenders the possibility of parole every 12 months. Moreover, the source points out that Mr. Isherwood did seek parole in 2015.

33. The source makes a number of submissions relating to the New Zealand Parole Board, arguing that the Parole Board is not an independent and impartial tribunal as it is required to be pursuant to articles 9 (4) and 14 (1) of the Covenant, including because it does not have broad powers to release inmates. These arguments are based on submissions made by the source in another case that is currently before the Committee, and relate particularly to the appointment and lack of secure tenure of members of the Parole Board. The source also points to the fact that an offender has to seek the leave of the Board in order to be represented by counsel, which does not sit comfortably with independence. The source argues that appointments to the Parole Board are political in actuality and appearance and that the appointment of members for a three-year period is inadequate and allows for political interference. The source notes that the appointments coincide with the three-year electoral cycle in New Zealand.

34. Finally, the source points to a new legislative regime in New Zealand that took effect in September 2015 and that allows the New Zealand Parole Board to postpone consideration of parole for up to five years, although an offender may apply for parole at any time if there is a significant change in his or her circumstances. The source submits that this ability to postpone consideration of parole for up to five years⁷ under section 13 of the Parole Amendment Act 2015 does not meet the requirements for a regular periodic review.

Further comments from the Government

35. Given the extensive submissions from the source on the independence of the New Zealand Parole Board, the Working Group decided to seek further information from the

⁷ Prior to the amendment, the period of a postponement order was up to three years for an offender serving a sentence of preventive detention (see sect. 27 (2) (a) of the Parole Act 2002).

Government regarding the Parole Board. On 21 October 2015, the Working Group requested the Government to clarify the use of the words “independent body” to describe the Parole Board in its response to the source’s original submissions. In addition, the Government was requested to provide additional information on the guarantees currently in place to ensure the independence of the Parole Board and how its members are designated. The Government was not given a time frame within which it was required to reply.

36. The Government responded to the request on 27 November 2015, the last working day before the start of the Working Group’s seventy-fourth session. As the Working Group was not able to consider the Government’s submissions during that session, the matter was discussed at the seventy-fifth session and submitted for final consideration at the seventy-sixth session.

37. In its comments, the Government notes that the case submitted by the source to the Committee involves a different time period and that there has since been a change in the legislation governing Mr. Isherwood’s case, as the Parole Act 2002 came into force in June 2002.

38. The Government submits that the New Zealand Parole Board is sufficiently independent, impartial and adequate in procedure to constitute a court within the meaning of article 9 (4) of the Covenant, even though the Parole Board does not have all of the attributes of an orthodox, judicial court. The Government refers to the case of *Manuel v. New Zealand*, in respect of which the Committee rejected the claim that the Parole Board did not satisfy the requirements of article 9 (4).⁸ The Government notes that the three-tier protection of regular review of detention by the Parole Board, the ability to apply for habeas corpus and the availability of judicial review of the Parole Board’s decisions (and the possibility of filing an appeal with the Court of Appeal based on the High Court’s findings on the review), have been found to be sufficient for the purposes of article 9 (4) in the *Manuel* and *Rameka* decisions.

39. The Government further argues that article 14 (1) of the Covenant does not apply to the New Zealand Parole Board. It submits that the “criminal limb” of article 14 (1) does not apply to parole proceedings because the Parole Board is not involved in the “determination of a criminal charge”. The Government also submits that the “civil limb” of article 14 (1) does not apply to the Parole Board because the appearance of a prisoner before the Board does not involve a determination of his or her rights and obligations in a suit at law. Moreover, even if the civil limb did apply to parole proceedings, the ability of a prisoner to seek judicial review of the Parole Board’s decision satisfies the requirement of access to a competent, independent and impartial tribunal for determination of a “suit at law” under article 14 (1).

40. Finally, the Government refers to a number of attributes of the New Zealand Parole Board indicating that it operates as an independent body. These include the status of the Parole Board as an independent statutory body, provisions of the Parole Act 2002 regarding the appointment and removal of Parole Board members, provisions requiring the Chair of the Parole Board to avoid actual or perceived bias on the part of the Board and the reporting and recording of Parole Board decisions. The Government also refers to the three-year term of Parole Board members, noting that such tenure does not compromise the independence of members given the other guarantees of independence under the Parole Act 2002. The fact that counsel may only represent prisoners with the leave of the Parole Board does not affect its independence either.

⁸ See communications No. 1385/2005, *Manuel v. New Zealand*, Views adopted on 14 November 2007, para. 7.3; and No. 1090/2002, *Rameka v. New Zealand*, Views adopted on 15 December 2003.

41. For these reasons, the Government submits that the New Zealand Parole Board is an independent body and that the detention of Mr. Isherwood is not arbitrary.

Discussion

42. The Working Group notes that Mr. Isherwood's case again raises the issue of preventive detention under New Zealand law, which has previously been the subject of review by the Working Group (most recently in its opinion No. 21/2015 and in the report on its visit to New Zealand in April 2014 (see A/HRC/30/36/Add.2, para. 47)), as well as by the Committee.⁹

43. The Working Group takes this opportunity to restate and reaffirm the requirements stated by the Committee in paragraph 21 of its general comment No. 35 in relation to preventive detention:

21. When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. States parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.¹⁰

44. The Working Group considers that the arguments advanced by the source do not disclose a violation of the requirements under international law. Firstly, as recognized by the Committee, preventive detention does not, in itself, violate international human rights law, provided that it meets the above requirements.

45. In the present case, the Working Group considers that there are compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future to justify Mr. Isherwood's continued preventive detention. Mr. Isherwood has a significant history of committing violent sexual offences, in particular offences involving girls under the age of 18. Mr. Isherwood committed the offences for which he was sentenced to preventive detention within two weeks of his release from prison, after having been convicted in 1999 for similar offences.

46. According to information provided by the source, in sentencing Mr. Isherwood to preventive detention for the offences he committed in July 2003, the High Court judge referred to the similarities between Mr. Isherwood's previous and most recent offences and to the fact that the latter occurred soon after he was released on parole. The judge noted the harm caused to the community by the offences committed by Mr. Isherwood, the factors that placed him at risk of reoffending and his failure to address the causes of the offending.

⁹ See, for example, *Rameka v. New Zealand*, *Dean v. New Zealand* and communication No. 1629/2007, *Fardon v. Australia*, Views adopted on 18 March 2010.

¹⁰ The Working Group reaffirmed these principles during a follow-up visit to Germany in November 2014 (see A/HRC/30/36/Add.1, paras. 25-26).

The judge considered that Mr. Isherwood's most recent offences, committed in 2003, caused serious harm to the community given that they involved the use of drugs to subdue an 18-year-old woman and the repeated sexual violation of the victim, and that the underlying motivation for carrying out those acts was to have the victim work as a prostitute. The judge took into account three reports (of a probation officer, a psychologist and a psychiatrist), all of which found that the risk of Mr. Isherwood reoffending was very high, and concluded that Mr. Isherwood was a significant and ongoing risk to the safety of the community and an enormous risk to young women. The judge referred to the previous eight-year finite sentence imposed on Mr. Isherwood in 1999, noting that it had failed dismally given that he reoffended very soon after being released, and concluded that the only way the community could be protected was through the preventive detention of Mr. Isherwood.

47. In its 2014 review of Mr. Isherwood's circumstances, which was carried out in order to report to the New Zealand Parole Board, the Department of Corrections noted that Mr. Isherwood had been subject to 26 proven charges of misconduct between December 2004 and September 2013. While those charges do not appear to have been related to violent sexual behaviour, they support the view expressed by the psychologist in his report that rehabilitation in custody should be the focus for Mr. Isherwood. In addition, the Government notes in its submissions that the Parole Board stated at its first hearing of Mr. Isherwood's case in April 2014 that he had "accepted that he had a considerable amount of work to do to address the causes of his offending". The source did not challenge the accuracy of the Government's restatement of this finding. In April 2014, the Parole Board held its first parole hearing for Mr. Isherwood and denied parole, noting that he had been assessed as posing a "very high risk of sexually violent offending".

48. In its second parole assessment report, prepared in March 2015, the Department of Corrections noted that Mr. Isherwood had also been the subject of four incidents (two relating to searches carried out by drug detection dogs, one relating to returning to a course and one to speaking in an aggressive manner). Mr. Isherwood received a warning for speaking in an aggressive manner but no conviction, as he had managed to de-escalate the situation. Although the incidents were minor compared to the previous sexual offences, it is not unreasonable for Mr. Isherwood's conduct in detention to be taken into account in considering whether he would be able to comply with the law or with any restrictions placed upon him once released into the community. In April 2015, the New Zealand Parole Board held its second parole hearing for Mr. Isherwood and denied parole. The updated psychological assessment noted that Mr. Isherwood's risk of committing sexually violent offences continued to be very high.

49. In concluding that there are compelling reasons to justify Mr. Isherwood's ongoing preventive detention, the Working Group has taken into account the very real risk that his sentence may become indefinite. As the Working Group has previously stated, the deprivation of liberty on an indefinite basis without an assessment as to the necessity and proportionality of the purpose of such detention in each individual case, and without review before a judicial or other independent authority, amounts to arbitrary detention that is inconsistent with international human rights law.¹¹

¹¹ For example, Working Group opinions No. 54/2015, No. 52/2014 and No. 10/2013. On the requirements of reasonableness, necessity and proportionality, see also Working Group deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (see A/HRC/22/44, especially para. 61) and the Committee's general comment No. 35, para. 12.

50. The determination of whether the preventive detention imposed in the present case was based on necessity and proportionality involves weighing the competing interests of the right to liberty of Mr. Isherwood against the safety and security to which members of the public are entitled. In considering what limitations on the rights of individuals may be permitted as “necessary in a democratic society”, the Working Group has found it useful to refer to jurisprudence of the European Court of Human Rights. Consideration must be given to the aim of the preventive detention, to whether such detention is legitimate and to whether preventive detention is needed to achieve the aim.¹² In its submission, the Government states that Mr. Isherwood is subject to ongoing preventive detention because “in the interests of public safety it is necessary that he be detained until he is assessed as no longer posing an undue risk”. The Working Group considers that maintaining public safety is a legitimate and reasonable aim, particularly in the present case, where the safety of young women as a vulnerable group and their right not to be subjected to violence must be taken into account. Moreover, for the reasons outlined in paragraphs 44-47 above, the Working Group considers that the ongoing detention of Mr. Isherwood is necessary to protect young women.

51. At the same time, consideration must be given to the proportionality of the preventive detention to the Government’s aim of maintaining public safety and protecting young women. In other words, the Government must demonstrate that this aim could not have been achieved by means less intrusive than continued detention¹³ and that preventive detention is a last resort. Alternatives to imprisonment include supervision and reporting requirements, residential restrictions and electronic monitoring (e.g. bracelets). In its most recent assessment of Mr. Isherwood’s case, in March 2015, the Department of Corrections considered some of those options, including community-based rehabilitative programmes, Global Positioning System monitoring and conditions restricting Mr. Isherwood’s access to children. Ultimately, however, the Department considered that, on the basis of Mr. Isherwood’s past poor compliance, he would be unlikely to comply with any rehabilitative conditions imposed and did not support his application for parole. The Department did, however, note that these would be appropriate ways to mitigate Mr. Isherwood’s high risk of reoffending once he no longer poses an unacceptable risk to the public and is suitable for release. The source states that there are less restrictive and more humane alternatives to preventive detention but has not suggested specific options that could be employed in the present case. On the basis of the information available to it, the Working Group considers that Mr. Isherwood’s rehabilitation can only be achieved, at this time, through his continued detention. Ongoing assessments indicate that Mr. Isherwood’s risk of once again committing violent sexual offences is still very high and, as discussed below, that he has not completed the necessary drug treatment programme, despite being offered the chance to do so in another region, which would have reduced his risk profile and allow him to undergo treatment for sex offending.

52. In relation to the submission that the risk assessment of Mr. Isherwood was vague, the Working Group notes that an assessment of the likely danger posed to the community when a person under preventive detention is released can never be completely certain. That finding has not led relevant bodies, such as the Committee and the European Court of Human Rights, to find that preventive detention is arbitrary per se. As the Committee has noted, a risk assessment involves “a finding of fact on the suspected future behaviour of a

¹² See, for instance, *Handyside v. the United Kingdom*, application No. 5493/72 (7 December 1976), paras. 42-59. In that case, reference is made to the phrase “necessary in a democratic society”, cited from art. 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

¹³ See *Fardon v. Australia*, Communication No. 1629/2007, 10 May 2010, para. 7.4.4.

past offender which may or may not materialize”.¹⁴ States parties to the Covenant must therefore exercise caution and provide appropriate guarantees in evaluating future dangers relating to those serving sentences in conditions of preventive detention. The Working Group considers that the Government has provided appropriate guarantees in the present case. As the Government points out, and the source does not contest, Mr. Isherwood had an opportunity to, but did not, challenge the risk assessment made in relation to his case by making submissions before the Parole Board, by internal review of the Parole Board decision (by the Chair or Panel Convenor of the Board) or by way of judicial review.

53. Furthermore, information submitted by the source, including the report prepared by the Department of Corrections in relation to the New Zealand Parole Board’s most recent hearing of Mr. Isherwood’s case in April 2015, indicates that Mr. Isherwood’s case was reviewed in 2014 and 2015 (in other words, that it has been kept under regular annual review) since he completed the minimum period of imprisonment without parole. In *Rameka v. New Zealand*, the Committee was of the view that the authors failed to show that compulsory annual reviews of preventive detention by the Parole Board, which are subject to judicial review, were insufficient to meet international standards (see para. 7.3).

54. The Working Group wishes to emphasize that the above findings are specific to the facts of the present case and do not rule out the possibility that preventive detention may be arbitrary in other circumstances.¹⁵ On the particular facts of the present case, the Working Group is satisfied that sufficient safeguards are in place at this stage to ensure that the justification for the preventive detention still exists, including regular periodic review of Mr. Isherwood’s risk profile. The Working Group stresses that the present case should not be understood as diminishing the right to liberty and that each case must be considered in its own context.

55. In that regard, the Working Group considers that the facts of Mr. Isherwood’s case can be distinguished from those of other recent cases involving preventive detention, in particular the case of *A v. New Zealand* (see Opinion No. 21/2015). In that case, a man suffering from serious intellectual disabilities was subjected to preventive detention with no plan for his integration or rehabilitation, and the Working Group considered that his detention was arbitrary. In the present case, Mr. Isherwood is being offered relevant treatment options intended to prepare him for release into the community. This treatment was already being provided to Mr. Isherwood in January 2013, when he first joined the drug treatment programme, over a year before he completed his minimum period of imprisonment without parole. He was also placed in the programme a second time in February 2014. Information provided by the Government and the most recent Department of Corrections report indicate that Mr. Isherwood is being considered for a third attempt. Once he has completed the programme, Mr. Isherwood will be able to complete a special treatment programme for sex offenders to assist his reintegration into the community. Furthermore, as the source acknowledges, Mr. Isherwood has been offered and has completed other relevant programmes, such as a four-session programme dealing with alcohol and other drugs Brief Support Programme in 2014. Finally, the most recent report from the Department of Corrections in March 2015 contains a “rehabilitative needs summary” and a “reintegrative needs summary” for Mr. Isherwood with specific start and

¹⁴ See *Fardon v. Australia*, para. 7.4.4.

¹⁵ For example, the source noted that the Parole Amendment Act 2015 allows the New Zealand Parole Board to postpone consideration of parole for up to five years. These provisions may violate the requirement for regular periodic reviews to determine whether the justification for preventive detention is still compelling, and may result in the arbitrary deprivation of liberty. There is no indication, however, that these provisions have been applied to Mr. Isherwood and it is not necessary for the Working Group to determine this point in the present case.

end dates for working with his case manager on areas such as pre-release treatment and relapse prevention, as well as post-release housing, health, well-being, lifestyle, work and education, and financial support.¹⁶

56. The Working Group considers that Mr. Isherwood was offered a fair chance of release by participating in treatment before his eligibility for parole was first considered by the New Zealand Parole Board in April 2014 and that he continues to receive relevant treatment. Even though Mr. Isherwood does not appear to be subject to different material conditions from those of prisoners serving finite sentences (e.g. different accommodation or living conditions),¹⁷ the conditions of Mr. Isherwood's preventive detention are sufficiently distinct from a punitive prison sentence because opportunities are being provided to him to access psychological and other care aimed at his rehabilitation and release. In *M. v. Germany*, the European Court of Human Rights stated, in relation to the level of care that must be provided to inmates in preventive detention and in order to limit the duration of their detention to what is strictly necessary, that "persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible".

57. The Working Group notes that attempts to provide Mr. Isherwood with care have not yet been successful in achieving his rehabilitation owing to factors such as Mr. Isherwood's change of medication when he was attempting to participate in the drug treatment programme on two previous occasions. The lack of success so far does not, however, negate what appear to be genuine attempts to address Mr. Isherwood's multiple treatment needs (for pain, anxiety, drug addiction and sex offending) within available resources and with a view to making his rehabilitation and release possible in accordance with article 10 (3) of the Covenant. In addition, the Working Group finds no violation of article 26 of the Covenant in the present case, as Mr. Isherwood is being offered relevant care and there is no basis to conclude that he has been discriminated against vis-à-vis prisoners serving a finite sentence in terms of access to treatment options.

58. A further distinguishing factor in the present case is Mr. Isherwood's failure to participate in his rehabilitation when a multidisciplinary team (composed of case managers, offender health staff and psychologists) overseeing his situation recommended in September 2014 that he complete the six-month drug treatment programme in another region. The Working Group recognizes that it is the duty of the Government to provide the assistance necessary for Mr. Isherwood to be released as soon as possible, but it is also incumbent upon Mr. Isherwood to take every opportunity provided by the Government to carry out rehabilitative activities in preparation for re-entry into the community. While Mr. Isherwood has the right to refuse treatment and cannot be forced to participate in rehabilitative activities, the Working Group considers that he cannot claim that he has not had a sufficient chance to reduce his risk of reoffending if he did not make every effort to participate in that treatment, even though it would have taken him away from his social support network. According to his case managers, Mr. Isherwood would have benefited from completing the programme in a more constructive environment in another region.¹⁸ In

¹⁶ New Zealand Department of Corrections, Parole Assessment Report to the New Zealand Parole Board, 23 March 2015, pp. 3-5.

¹⁷ The Committee did not find that the material conditions of preventive detention in New Zealand amounted to arbitrary detention in the *Rameka* or *Dean* cases.

¹⁸ In its reply to the source's submissions, the Government stated that the team overseeing Mr. Isherwood had suggested that Mr. Isherwood complete the programme in another region, and that this "would provide a more constructive environment that might lessen some of the behavioural issues and disruptive tendencies associated with Mr. Isherwood maintaining his profile at Christchurch Men's

paragraph 7.5 of *Dean v. New Zealand*, the Committee found that the author contributed to the delay in his release by choosing not to attend certain rehabilitation programmes, which would have been an important preliminary step in developing his release plan, and thus could not show a violation of articles 9 (1) and 10 (3) of the Covenant. Similarly, Mr. Isherwood chose not to attend a rehabilitation programme that would have been an important preliminary step in addressing the causes of his offending and preparing him for reintegration into society.¹⁹

59. The Working Group is grateful for the extensive arguments advanced by the source and the Government regarding the independence of the New Zealand Parole Board. As the source notes in its original submission to the Working Group, this issue is the subject of a separate communication to the Committee, which has yet to be determined. The Working Group has come to its own conclusion on this issue, however, because a preventive detention regime will only meet the requirements set down by the Committee in its general comment No. 35 if regular periodic reviews are conducted by an independent body to determine whether continued detention is justified.

60. The Working Group has taken into consideration submissions relating to the possibility of political interference with the New Zealand Parole Board's operations, given the three-year terms for members and the potential appearance of political influence in some appointments. The Working Group notes that a three-year term with the possibility of reappointment is not unusual in the parole context, as indicated by the legislative provisions cited in the Government's submission concerning the three-year terms of various parole boards in several different countries. Moreover, the Working Group considers that the three-year terms present no significant challenge to the independence of Parole Board members, given other statutory guarantees under the Parole Act 2002 that require the Parole Board to function with a high degree of independence and transparency. Among the statutory guarantees are the following:

(a) Parole Board members are appointed by the Governor General on the recommendation of the Attorney General. Before recommending the appointment of a member, the Attorney General must be satisfied that the person holds appropriate qualifications (sect. 111);

(b) Parole Board members can only be removed for just cause by the Governor General, on the recommendation of the Attorney General (sect. 121 (2));

(c) The Chair must be a former or current judge of either the High Court or the District Court (sect. 112). The Parole Board must include at least nine panel convenors, who must be former or current District Court judges or barristers or solicitors who have held a practising certificate for at least seven years (sects. 111 (2) (b) and 114 (1));

(d) The Parole Board is required to act consistently with the principles of natural justice: the Chair must ensure that a member with actual or perceived bias for or against an offender is not involved in decision-making regarding that person (sect. 118 (2)) and decisions must be in writing and include reasons (sect. 116 (3));

Prison". The March 2015 Department of Corrections report to the New Zealand Parole Board noted that Mr. Isherwood has a well-established connection with a gang that "appears to feed into his antisocial conduct in prison" (p. 3).

¹⁹ The European Court of Human Rights reached a similar conclusion in *Grosskopf v. Germany*, application No. 24478/03, 21 October 2010, para. 52. In that case, the person subject to preventive detention had refused to undergo any therapy that might have lowered the risk of him committing further serious property offences in future.

(e) The Parole Board develops and revises its own policies (sect.109 (2) (a)) and regulates its own procedures (sect. 117A);

(f) An offender who is the subject of a Parole Board decision can apply for internal review of the decision by the Chair or a panel convenor (sect. 67). The Chair must ensure that no person involved in a parole hearing is involved in the review of a decision of that panel (sect. 118 (1)). The decisions of the Parole Board are also subject to judicial review.

61. Having considered all the submissions made in the present case, the Working Group is satisfied that the above statutory guarantees are sufficient to allow the New Zealand Parole Board to meet the standard of independence set out in the Committee's requirements for preventive detention regimes. The Committee reached the same conclusion regarding the independence of the Parole Board in the *Rameka* and *Manuel* cases cited above.

62. Finally, given the serious implications for Mr. Isherwood's right to liberty, the Working Group has considered whether his preventive detention meets the principle of legality required by the rule of law. The principle of legality requires that no crime or punishment exist without a legal ground (or *nullum crimen, nulla poena sine lege*), as enshrined in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant.²⁰ It has been argued in some of the dissenting views expressed by members of the Committee that inmates in preventive detention are being sentenced and punished for what they might do when released rather than for a crime that has been committed, contrary to article 15 (1) of the Covenant, which only permits the criminalization of past acts.²¹ That argument means, in effect, that preventive detention is arbitrary in itself, as it will always be based on an assessment of the likelihood of reoffending for the purposes of protecting the public.

63. The Working Group notes, however, that this position is not the majority view of the Committee, as demonstrated in the *Rameka* and *Dean* cases, for example, nor is it consistent with the jurisprudence of the European Court of Human Rights. In the respectful view of the Working Group, this understanding of preventive detention does not allow for an appropriate balance to be struck between the human rights of the detainee and those of other persons who form part of the community in exceptional cases involving offenders for whom past finite sentences have manifestly failed to achieve the aims of the sentences imposed. In addition, the Working Group notes that the period of preventive detention, if genuinely aimed at the detainee's rehabilitation and reintegration into society, is not punitive and is intended to protect society, in particular young women. Preventive detention therefore does not fall under the scope of article 15 (1) of the Covenant. For these reasons, the Working Group finds that there has been no violation of the principle of legality in Mr. Isherwood's case. Similarly, Mr. Isherwood continues to serve the sentence that was imposed at the time of his conviction in 2004, including the preventive element. He has not been charged with any additional offence that would violate his right to the presumption of innocence under article 14 (2) of the Covenant, nor has he been subjected to double punishment under article 14 (7) of the Covenant.

²⁰ See also Working Group opinions No. 10/2013, para. 37, and No. 56/2012.

²¹ See, for example, the dissenting view of Rajsoomer Lallah in *Rameka v. New Zealand*, annex.

Disposition

64. In the light of the foregoing, the Working Group finds, on the basis of paragraph 17 (b) of its methods of work, that the present case is not a case of arbitrary detention.

[Adopted on 24 August 2016]
