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DOES THE SENTENCE OF PREVENTIVE DETENTION IN NEW ZEALAND INFRINGE THE HUMAN RIGHTS OF DANGEROUS OFFENDERS?

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Abstract

The paper examines the regime of preventive detention New Zealand and answers the question whether the indeterminate sentence of preventive detention infringes the fundamental rights of dangerous offender. When confining offenders because of their dangerousness, the legislation must find the balance between the right of the community to be protected from dangerous people and the civil and political rights of the offender.

The paper identifies the main human rights concerns that came up on national level during the period of the preparation to the New Zealand Sentencing Act 2002 and the concerns raised by the United Nations Human Rights Committee regarding New Zealand's international obligations under the ICCPR. Moreover, the paper examines the human right issues that came up in decisions of the Supreme Court of Canada and the European Court of Human Rights concerning the prolonged detention of dangerous offender.

The paper comes to the conclusion that the New Zealand regime of preventive detention is in compliance with the principles of double jeopardy, the presumption of innocence, the prohibition of retroactive law and most fair trials safeguards. However, section 89 (2) of the Sentencing Act 2002 infringes upon the right of the offender to have his or her detention reviewed as soon as the reason for the detainment is no longer the offence committed but the dangerousness – an aspect of the offender's character that might change in the future.

Word length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 13,200 words.

I INTRODUCTION

> *[In my] opinion, the continued practice of preventive detention [flies] in the face of modern theories and principles of criminal jurisprudence.*[1]

Preventive detention in New Zealand is the preventative detention of very dangerous offenders as sentencing option.[2] As highlighted in the new Sentencing Act 2002, the purpose of preventive detention is "to protect the community from those who pose a significant and ongoing risk to the safety of its members."[3] Instead of a determinate prison sentence, offenders can be sentenced to preventive detention for an indeterminate period.[4] The sentence of preventive detention is, however, only for offenders who commit violent crimes and who pose, as a result of their likelihood of recidivism, a disproportionate risk to the public.[5]

The principal difficulty of preventive detention is to balance the right of the community to be protected from dangerous people with the civil and political rights of the offender.

Preventive detention is of particular concern for New Zealand since the UN Human Rights Committee (hereinafter the Committee) identified preventive detention as major human rights concern, whereas the New Zealand Court of Appeal held that preventive detention does not violate the offender's human rights. The New Zealand Government reported about preventive detention to the Committee in

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[1] Prafullachandra Natwarlal Baghwati, chairperson of the UN Human Rights Committee, during the meeting with the New Zealand Delegation on July 15th, 2002; see UN Human Rights Committee *Summary Record of the 2016th meeting: New Zealand* (15.07.2002) UN Doc CCPR/C/SR.2016 para 56.

[2] Geoffrey G Hall, Stephen O'Driscoll (Presenters) *Seminar: The New Sentencing and Parole Acts* (New Zealand Law Society, Wellington, 2002) 71; the sentence of preventive detention must be distinguished from the preventive detention in the sense of a pre-trial detention. Even the UN ICCPR Committee seems to have some problems to distinguish this. This terminology issue made also the research very difficult, as there is an enormous quantity of literature on "preventive detention" dealing only with pre-trial detention rather than with the sentencing of dangerous offender.

[3] Sentencing Act 2002, s 87 (1).

[4] See for the statutory requirements when a person can be sentenced to preventive detention, Sentencing Act 2002, ss 87-89 and in details below; the only other indeterminate incarceration is the sentence of life imprisonment in the case of murder.

[5] Mark Brown "Serious offending and the management of public risk in New Zealand" (1996) 36 Brit J of Crim 18, 18.

its third periodic report to the International Covenant on Civil and Political Rights (hereinafter the Covenant) in 1994.[6] In its concluding comments, the Committee was concerned about preventive detention and recommended that New Zealand revised the provisions, so that preventive detention complied with the Covenant.[7] In 1998, however, the New Zealand Court of Appeal held in *Leitch*[8] that preventive detention does not violate the offender's human rights.

In the fourth report from May 2001, the New Zealand Government described the regime of preventive detention in detail and tried to persuade the Committee that it did not violate the Covenant.[9] During the meeting of the New Zealand delegation and the Committee, the chairperson in his final comment pronounced the above-quoted comment, indicating that the Committee still has serious concerns about the practice of preventive detention in New Zealand.[10] In a decision from October 2002, however, the Court of Appeal upheld its decision in *Leitch* in view of the new Sentencing Act 2002.[11]

This paper analyses the sentence of preventive detention in New Zealand and will answer the question whether it infringes the human rights of the offender.

The paper first identifies the issues associated with preventive detention and dangerous offenders, and introduces three main legislation options of how to deal with such type of offenders. Further, it shows the concerns that were raised during the preparation of the Sentencing Act 2002 and presents the current provisions on preventive detention in New Zealand. After acknowledging the opinions of the Committee's members and the issues they raised during the meetings with the New Zealand delegation, the respective articles of the Covenant will be studied. Moreover, the paper examines how dangerous offenders are dealt with in Canada and Europe. The study of these jurisdictions will lead to the question of what New

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[6] Government of New Zealand *Third periodic report under Art 40 of the Covenant* (30.05.1994) UN Doc CCPR/C/64/Add.10 para 58.
[7] Report of the Human Rights Committee to the General Assembly UN GAOR 50th Session Suppl No 40 UN Doc A/50/40 (1995) paras 179 and 186.
[8] *R v Leitch* [1998] 1 NZLR 420 (CA), considering the provisions on preventive detention in the Criminal Justice Act 1985.
[9] Government of New Zealand *Fourth periodic report under Art 40 of the Covenant* (15.05.2001) UN Doc CCPR/C/NZL/2001/4 paras 107-125.
[10] See UN Human Rights Committee *Summary Record of the 2016th meeting: New Zealand* (15.07.2002) UN Doc CCPR/C/SR.2016 (comment by Prafullachandra Natwarlal Bhagwati) para 56.
[11] *R v D* [2003] 1 NZLR 41 (CA).

Zealand could learn from the human rights or due process concerns raised before the respective courts in regard to the Canadian Charter of Rights and Freedoms and the European Convention on Human Rights. The landmark decisions of the Canadian Supreme Court and the European Court of Human Rights will help to evaluate the overall question whether preventive detention in New Zealand violates the offenders' basic and fundamental rights.

II THE IDEA OF PREVENTIVE DETENTION

A Identifying the Problem

Preventive detention deals with the challenge to public safety presented by a minority of people, who are not mentally ill in the strictly medical sense but whose personality disorders pose a high risk to society.[12]

The problem in this context is that criminal law allows rarely for an indeterminate prison sentence for other offences than murder;[13] every other offence has a maximum sentence determined in the penal code after the termination of which the offender must be released. Additionally, indeterminate confinement in a mental institution under civil law is mostly only possible when the person has a recognised mental illness.

Between the two spectra of people – on the one side the criminal and on the other side the mentally-ill – a small group of criminals can be identified to be totally aware of what they do, so that it is not possible to consider them as suffering from a mental illness, but who still pose a very high risk to the public because of their likelihood of recidivism and their violent deeds. Thus, the law tries to distinguish these violent offenders from "normal" offenders. This distinction reflects a view that "the public are disproportionately at risk from individuals who commit certain types of offences and that, in the task of risk management, government should vary its

[12] See Mark Brown "Serious offending and the management of public risk in New Zealand" (1996) 36 Brit J of Crim 18, 18; see also Department of Health of England and Wales "Managing Dangerous People with Severe Personality Disorder – Proposal for Policy Development" (Home Office, London, 1999) 5.

[13] See for example the Crimes Act 1961in New Zealand, Crimes Act 1961, s 172.

response according to the degree of severity of harm."[14] However, every person is entitled to human rights and so is the criminal offender. She or he has the right to liberty, the right to be presumed innocent until found guilty by a court, the right not to be arbitrarily detained, to be punished only once for one crime and only if the law prohibiting his/her crime already existed at the time he/she committed it.[15] If a government of a state did nothing, it would infringe its general duty to protect its citizens from violent offenders.

Thus, preventive detention tries to bridge the gap between the right of the community to be protected by the state from dangerous people and the civil and political rights of the offender.

B From Treatment of Offender to Protection of Community

The legislation on dangerous offenders can be divided into three groups.[16] Some countries lay the uppermost importance upon the treatment of offenders; other countries focus on community protection. Another, earlier, approach to serious violent offenders can be found in the form of the "justice model".

1 Justice Model

The justice model was based on the assumption that the offender is a rational self-determining actor who deserved punishment, in contrast to the legally insane.[17] The punishing sentence was calculated on the idea of desert and proportionality, and retribution and deterrence, taking into account the seriousness of the offence and the criminal history of the offender. However, the factor of deterrence and retribution could not completely outweigh the aspect of proportionality, with the result that the

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[14] Mark Brown "Serious offending and the management of public risk in New Zealand" (1996) 36 Brit J of Crim 18, 18; naming this kind of policy that creates two classes of offenders a "twin track policy".

[15] See ICCPR, article 9 and 14; see also New Zealand Bill of Rights Act 1990, ss 22-26.

[16] See Michael Petrunik "Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice" (Supply and Services Canada, Ottawa, 1994) Part VI, online available at Department of the Solicitor General of Canada <http://www.sgc.gc.ca/publications/corrections/pdf/199402_e.pdf> (last accessed 26.8.2003).

[17] Clare Connelly and Shanti Williamson "A review of the Research Literature on Serious Violent and Sexual Offenders" (Scottish Executive Research Unit, Edinburgh, 2000) 1.25.

court was not allowed to impose an indeterminate sentence.[18] Despite imposing strict punishment and longer sentences, the justice model had one major flaw regarding high-risk offender: it could not give a satisfactory solution to the problem of offenders who had served their deserved sentence but who still posed a serious threat to the safety of the community.

2 Clinical Model

The clinical model highlights the possibility of treatment of dangerous offenders. Their deviant and abnormal behaviour is seen as a result of an illness, which is curable with medical and psychological treatment. Psychiatry is seen as having developed an accuracy so as to identify and treat dangerous sexual and violent offender.[19] The goal of such model is to prevent crime through treatment and rehabilitation.[20] Yet, the faith and trust in the power of medicine and psychiatry declined after statistics showed a high percentage of recidivism among the offenders who received treatments. In fact, recidivism rates of treated offenders who were deemed to be cured were shown to be comparable to offenders who had not been committed for treatment.[21]

This medical approach can still be found in some countries, but recent amendments in their legislation point towards a shift from offender treatment to community protection.[22] Nevertheless, even though this shift became apparent over the last years, countries with a long tradition of the clinical model still have a therapeutic and medical emphasis in dealing with very dangerous offenders.[23]

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[18] See Michael Petrunik "Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice" (Supply and Services Canada, Ottawa, 1994) part I.

[19] Andrew Horwitz "Sexual Psychopath Legislation: Is there Anywhere to Go But Backwards?" (1995) 57 Univ of Pittsburgh LR 35, 39.

[20] Lisa A Wilson "No Longer Free to Offend: Involuntary Civil Commitment Statutes for Sexual Predator Create the Basis for a Uniform Act" (1998) 18 North Illinois U LR 351, 353.

[21] Horwitz, above, 45; reports, however, have begun to claim some level of success with certain types of sexual offenders under certain treatment conditions, see Horwitz, above, 35 Fn 54.

[22] For example in England and the Netherlands.

[23] see Michael Petrunik "Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice" (Supply and Services Canada, Ottawa, 1994) part I.

3 *Community Protection Model*

The community protection model is the most recent way to handle dangerous offenders. The Treatment of dangerous offenders is deemed to be secondary in comparison with public safety and the "very" dangerous offender, who poses a high risk on the community, should be detained indeterminately and never released.

Two main reasons are at the origin of this model. First, the early optimism of dangerous offender treatment policies made way for a strong pessimism towards the ability of psychological and medical endeavours to treat violent and sexual offenders effectively.[24] And secondly, high public pressure pushed the drive for reform:[25] politicians had to react to appease the public outcry about yet another horrific offence committed by a recently released offender. So led the "very highly publicized and particularly gruesome sexual offence" of E. Shriner to the enactment of Washington's Sexual Predator Act;[26] the case of serial rapist John Douglas Bennett was the reason for the extension of the scope of preventive detention in New Zealand in 1987.[27]

Countries that adopted the community protection model can be further divided into two main types of legislation. In some jurisdictions, namely in the USA, the decision on indeterminate detention of dangerous offenders takes place *following* the service of the determinate sentence, which was based on proportionality and just desert. In other jurisdictions, namely Canada, some states in Australia, and in New Zealand, the decision of whether the offender should be incarcerated indefinitely is made *at the point* of sentencing.

III PREVENTIVE DETENTION IN NEW ZEALAND

This chapter presents the concerns regarding preventive detention identified during the preparation of the new Sentencing Act 2002 and introduces the current preventive detention provisions in New Zealand.

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[24] Andrew Horwitz "Sexual Psychopath Legislation: Is there Anywhere to Go But Backwards?" (1995) 57 Univ of Pittsburgh LR 35, 47.

[25] See generally on the issue of public perception and the drive for reform Isabel Grant "Legislating Public Safety: The Business of Risk" (1998) 3 Canadian Criminal Law Review 177, 185.

[26] See Horwitz, above, 48.

[27] See John Meek "The Revival of Preventive Detention in New Zealand 1986-1993" (1995) 28 Australian and New Zealand Journal of Criminology 1, 2.

A The Sentencing and Parole Reform Bill

In New Zealand the sentence of preventive detention is an ongoing political issue and the sentence was amended several times.[28]

During the preparation period to the Sentencing Act 2002, one Memorandum prepared for the Cabinet Policy Committee on the Sentencing and Parole Reform Bill proposed the abolition of the sentence.[29] Even though the memorandum recognised the necessity of confining offenders beyond the sentence they received if they still pose a considerable risk to the community, it referred to the Penal Policy Review Committee in 1981, which noted that the use of preventive detention is "arbitrary, selective and inequitable".[30] As a replacement for the sentencing option of preventive detention, the memorandum proposed a new sentence whereby an offender convicted of a serious violent or sexual offence could be declared a "dangerous offender" and sentenced to an indeterminate term of imprisonment. This eventually resembles the existing sentence of preventive detention in purpose, that is the confinement of sexual or violent offenders who are likely to commit another serious sexual or violent offence if released at the time their available sentence had expired, but had some novel procedural features, such as greater guidance to the court when this sentence should be imposed, greater flexibility in fixing non-parole periods to address better the case of the individual offender and an automatic right to appeal to the Court of Appeal.[31]

However, the New Zealand Government decided to keep the sentence of preventive detention, but to amend the legislation in several points.

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[28] In the beginning the sentence of preventive detention was limited to repetitive sexual offenders and to offenders of at least 25 years of age. In 1987, this was extended to serious offences of violence and the age-threshold lowered to 21 years. The legislation was further amended in 1993 so as to comprise first offenders convicted for sexual violation. However, offenders of violent crimes still needed a prior conviction to be eligible for preventive detention. Initially, every person sentenced to preventive detention had there first parole hearing after having served ten years. This was made slightly more flexible in 1993, as the court received the power to impose a term that exceeds ten years; see for a comprehensive overview over the history of preventive detention John Meek "The Revival of Preventive Detention in New Zealand 1986-1993" (1995) 28 Australian and New Zealand Journal of Criminology 1, 9.

[29] Memorandum prepared by Hon Phil Goff cited in G Hall and Stephen O'Driscoll (presenters) *Seminar: The New Sentencing and Parole Acts* (New Zealand Law Society, Wellington, 2002, 71.

[30] Hall and O'Driscoll, above, 71.

[31] Hall and O'Driscoll, above, 71.

B The Sentencing Act 2002

The new Sentencing Act 2002 extends further the range of offenders on who preventive detention can be imposed. First, the age-threshold of the offender was reduced: the person must now be (only) 18 years of age or over at the time committing the offence.[32] Second, under the new legislation, a wider range of offences, when committed, qualify the offender for the sentencing option of preventive detention ("qualifying sexual or violent offences").[33] 'Qualifying offences' are any sexual crime punishable by seven or more years' imprisonment (such as all (attempted) sexual violations, indecent assault on women or girls, incest, indecency),[34] sexual conduct with children outside New Zealand,[35] organising and promoting child sex tours; additionally, 'qualifying offences' include certain serious violent offences,[36] such as attempt to murder and conspiracy to murder (murder entails mandatory life imprisonment anyway[37]),[38] manslaughter,[39] wounding or injuring with intent,[40] discharging of firearm and acid throwing,[41] abduction of woman or girl and kidnapping, and any form of robbery.[42] Some members of the Select Committee to the Sentencing Bill wanted preventive detention available for those convicted of arson, but this proposal was not inserted in the final act.[43] The most significant amendment is finally the abolishment of the requirement for the offender to have a previous conviction; the sentence of preventive detention can be imposed on both sexual offenders and violent offenders in their first conviction.

The expansion of the new legislation, regarding both offenders and offences, was counter-balanced by adjustments to the sentencing procedure and with a more flexible parole regime. The new legislation stipulates more stringent criteria the court must take into account when considering whether to impose a sentence of preventive detention.[44] Moreover, the court may now impose a non-parole period of

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[32] Sentencing Act 2002, s 87 (2) (b).
[33] Sentencing Act 2002, s 87 (2) (a), (5).
[34] All crimes punishable by seven or more years' imprisonment under Part VII of Crimes Act 1961.
[35] Crimes Act 1961, s 144A.
[36] Crimes Act 1961, s 144C.
[37] Crimes Act 1961, s 172.
[38] Crimes Act 1961, s 173, 175.
[39] Crimes Act 1961, s 181.
[40] Crimes Act 1961, ss 189 (1) and 188 respectively.
[41] Crimes Act 1961, ss 198-199.
[42] Crimes Act 1961, s 234, 235, 237.
[43] Geoffrey G Hall, Stephen O'Driscoll (presenters) *Seminar: The New Sentencing and Parole Acts* (New Zealand Law Society, Wellington, 2002) 72.
[44] Sentencing Act 2002, s 87 (4).

minimum five years (instead of ten years); there is no specified maximum period of non-parole.[45]

IV PREVENTIVE DETENTION AND THE CRITICISM OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

Preventive detention was not only criticised domestically but also on an international level. This chapter identifies on what aspects the Human Rights Committee criticised the sentence of preventive detention.[46] Then, the paper examines the alleged violations of the respective articles of the Covenant and clarifies whether the Committee is correct with its opinion that preventive detention infringes human rights.

A The Criticism of the UN Human Rights Committee

On the list of issues to the third report to the Covenant, the Human Rights Committee sought "clarification of the evidence that was relevant in determining whether an offender was likely to repeat an offence of sexual violation, the standard of proof that applied and the compatibility of the provisions relating to preventive detention with articles 9 and 14 of the Covenant, particularly with respect to the presumption of innocence."[47] Article 9 and 14 of the Covenant deal respectively with arbitrary arrest and detention, and the right to fair trial and due process.

The New Zealand delegation tried to clarify the issue during the meeting with the Committee in May 2002; however, some Committee members still had considerable difficulty since "the use of the expression 'preventive detention' … was unusual in that it seemed to include the possibility of imposing an added indeterminate sentence based on the likelihood of recidivism."[48] Accordingly, "the

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[45] Sentencing Act 2002, s 89 (1).

[46] It must be noted that the Committee could not criticise the Sentencing Act 2002 since this act was not yet in force. As seen above, however, the former sentence of preventive detention was upheld and broadened in the new act, so that the Committee is likely to have even more concerns regarding the new legislation.

[47] See UN Human Rights Committee *Summary Record of the 1394th meeting: New Zealand* (07.05.1994) UN Doc CCPR/C/SR.1394 para 19.

[48] See UN Human Rights Committee *Summary Record of the 1394th meeting: New Zealand* (07.05.1994) UN Doc CCPR/C/SR.1394 (Comment by Mrs. Higgins) para 21.

purpose of imprisonment was essentially to remove persons indefinitely from circulation, on their initial offence."[49]

In its fourth periodic report to the Covenant in 2001 before the oral session, the New Zealand Government tried to dissolve the concerns regarding the imposition of the punishment of preventive detention.[50] Despite the detailed description, some members of the Committee were still not satisfied that the provision of the Criminal Justice Act 1985[51] dealing with 'preventive detention' was compatible with the rights enshrined in the Covenant. As the Committee deemed preventive detention to "permit punishment for possible future crimes", it was again on the list of issues for the consideration of New Zealand's fourth report before the Committee.[52]

In addition to article 9 and 14 of the Covenant, the Committee was interested at some stage in the meeting with the New Zealand delegation in July 2002 whether preventive detention was compatible with article 15 of the Covenant dealing with the principle that there should be no punishment without at offence at the time when the offence was committed.[53] Moreover, one Committee member alleged that preventive detention was a sort of double punishment, infringing the double jeopardy provision of the Covenant.[54]

In its concluding observations to the fourth periodic report of New Zealand, the Committee held that "with regard to the possible impact of the punishment of preventive detention [upon the rights of the Covenant] … [it] still has some concerns and looks forward to pursuing its dialogue with the State party further on this issue."[55]

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[49] See UN Human Rights Committee *Summary Record of the 1394th meeting: New Zealand* (07.05.1994) UN Doc CCPR/C/SR.1394 (Comment by Mrs. Higgins) para 21.

[50] Government of New Zealand *Fourth periodic report under Art 40 of the Covenant* (15.05.2001) UN Doc CCPR/C/NZL/2001/4 paras 107-125.

[51] Criminal Justice Act 1985, s 75 (repealed).

[52] See UN Human Rights Committee *List of Issues New Zeland* (18.10.2001) UN Doc CCPR/C/74/L/NZL Nr. 10.

[53] See UN Human Rights Committee *Summary Record of the 2016th meeting: New Zealand* (15.07.2002) UN Doc CCPR/C/SR.2016 para 46.

[54] Comment by Christine Chanet, see UN Human Rights Committee *Summary Record of the 2015th meeting: New Zealand* (14.01.2003) UN Doc CCPR/C/SR.2015 (document in French only) para 32: "En effet, cette mesure procède d'une appréciation de la dangerosité de l'accusé, sans qu'il soit fait référence à l'infraction initiale – qui est, elle, visée par la peine principale. L'internement de sûreté constitue ainsi une sorte de *double peine* …"

[55] UN Human Rights Committee *Concluding Observations: New Zealand* (07.08.2002) UN Doc CCPR/CO/75/NZL para 10.

These comments demonstrate that the Human Rights Committee has considerable concerns regarding preventive detention. In the following, the paper studies whether preventive detention infringes articles 9, 14 and 15 of the Covenant.

B Article 9 ICCPR – Liberty and Security of the Person

The header of article 9 identifies this article as dealing generally with the liberty and the security of a person. Section one enshrines the right to liberty and security of person, the prohibition of arbitrariness and the principle of legality in case persons are detained. Sections two to five detail the rights for arrested or detained persons. They encompass the rights of the arrested person in the case of pre-trial detention to be informed of the reasons of arrest and of the charges against him/her, the right to have a court proceeding without delay, and to have the lawfulness of the detention examined.

1 Prohibition of arbitrariness, article 9 (1) 2 ICCPR

The prohibition of arbitrariness is directed both at the stage of domestic legislation and on the stage of enforcement: not only the law itself but also its application by the enforcement's organs must not be arbitrary.[56] The enforcement of the law cannot be examined here since that is a matter of the individual case and out of the scope of the paper. However, the paper examines whether the domestic legislation is arbitrary in the meaning of article 9 (1) 2 of the Convention.

(a) The Penal Policy Review Committee of 1981

The Penal Policy Review Committee in 1981, reviewing the sentence of preventive detention, found "a number of criticisms" and observed "that there are indications that its use is *arbitrary*, selective and inequitable".[57]

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[56] Manfred Nowak *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (Engel, Kehl, 1993) 172.

[57] See citation (emphasis added) in John Meek "The Revival of Preventive Detention in New Zealand 1986-1993" (1995) 28 Australian and New Zealand Journal of Criminology 1, 22; see also Geoffrey G Hall, Stephen O'Driscoll (presenters) *Seminar: The New Sentencing and Parole Acts* (New Zealand Law Society, Wellington, 2002) 71.

The years preceding this review in 1981, preventive detention seemed to be a nearly forgotten sentence. The courts had imposed preventive detention just once between 1978 and 1981 and the sentence had even been quashed on appeal. It must be noted that at this time offenders were only qualified for preventive detention when having been committed of one sexual offence. That is one reason why the Penal Policy Review Committee found the use arbitrary and selective: it questioned the legislation on the ground that "there is no rationale for its restriction to sex offenders."[58] The current legislation, however, is not restricted on sexual offenders but includes other violent criminals.[59]

The other major concern was then that the legislation instructed the Parole Board not to recommend release unless the prisoner was unlikely to commit further sexual offences. This could lead to arbitrary detention, since the Parole Board is evidently not a court but it had the statutory restriction of recommending release only if it believed that a detainee was unlikely to commit further offences.

An additional concern was the fact that the Parole Board was only given the authority to recommend the release to the Minister of Justice, who made the final decision. The release from detention, and thus the deprivation of the offender's liberty, was in the hand of neither judges of a court nor experts of the Parole Board but in the hand of a politician. Politicians, however, exercise caution with regard to their voters' feelings and expectations, and are more reluctant to authorise release of a person who had been sentenced to preventive detention and was deemed a high risk for re-offending and consequently for society.[60]

These two major deficiencies in the legislation were already amended through the Criminal Justice Act 1985 and the new Sentencing Act 2002 abides these amendments; in particular, the parole board, instead of merely recommending the release, received the power to release offenders.

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[58] See citation in John Meek "The Revival of Preventive Detention in New Zealand 1986-1993" (1995) 28 Australian and New Zealand Journal of Criminology 1, above, 22.
[59] See to the current legislation below lit (c) Sentencing Act 2002.
[60] See Meek, above, 26.

(b) Arbitrariness due to inconsistency and the role of the Court of Appeal

It was observed that the sentence of preventive detention has still been imposed inconsistently ever since.[61] Insofar, preventive detention was criticised as being at the discretion of the individual judge since no statutory guidance was given to the court. In these circumstances, it was the Court of Appeal's role, when reviewing sentences of the High Court that imposed preventive detention, to establish guidelines to "ensure, within reasonable limits, the even-handed administration of justice throughout the country."[62] The Court of Appeal recognised that when imposing the special sentence of preventive detention there "can be no doubt that the objective always must be equal punishment so far as it may be possible."[63] The Court of Appeal generally has a central role in sentencing policy, and even though it has always a particular case to consider, it has the ability to establish guidelines through a consistent case law.[64] Over the years the Court of Appeal has failed its role in this regard. Occasionally, the reasons given for imposing preventive detention have even been used as argument to quash the sentence.[65]

Yet, in 1998, the Court of Appeal tried to give some assistance and held in the case of *Leitch* that, "among other factors", the following are likely to be relevant when imposing preventive detention:[66]

> the nature of the offending, its gravity and the time span; the category of victims and the impact on them; the response to previous rehabilitation efforts; the time elapsed since any relevant previous offending and the steps taken to avoid reoffending; acceptance of responsibility and remorse for the victims; predilection or proclivity for offending taking account of professional risk assessments and the prognosis for the outcome of available rehabilitative treatment.

None the less, the criticism of arbitrariness was, even after this decision, still valid since article 9 (1) 2 of the Covenant prohibits arbitrariness in connection with the national legislature itself. It is not clear whether the establishment of guidelines

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[61] See the examples in John Meek "The Revival of Preventive Detention in New Zealand 1986-1993" (1995) 28 Australian and New Zealand Journal of Criminology 1, 46-50.
[62] See *R v Pawa* [1978] 2 NZLR 190, 191 (CA) Richmond J for the Court.
[63] See *R v Pawa*, above, 191.
[64] Meek, above, 41.
[65] Meek, above, 51.
[66] *R v Leitch* [1998] 1 NZLR 420, 429 (CA) Richardson J.

through case law is sufficient to comply with the Covenant. The Sentencing Act 2002, however, could have remedied this lack of statutory guidelines.

(c) Sentencing Act 2002

In the already mentioned memorandum prepared during the period of preparation to the Sentencing Act 2002, inconsistency was recognised as a major flaw of preventive detention. In its proposal for a new sentence, the memorandum pledged for "greater guidance to the court as to when this sentence should be imposed."[67] In fact, the guidance in the Criminal Justice Act 1985, which incorporated the former provisions on preventive detention, was rather minimal in stipulating that "the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention."[68] Additionally, the High Court had to have regard to a psychiatric report and must be "satisfied that there is a substantial risk that the offender will commit a specified offence upon release."[69] This, indeed, did not give any guidance for the High Court and could have entailed inconsistent and thus arbitrary sentences. Even though the recommendation of the memorandum to establish a new sentence was not adopted, the new Sentencing Act 2002 incorporates more stringent guidance to the courts.

The Sentencing Act 2002 adopted the above-mentioned criteria set forth by the Court of Appeal in *Leitch*, although in other wording. Two factors of the new legislation should be highlighted. First, section 87 (4) of the Sentencing Act 2002 stipulates that the Court *must* take the factors into account when considering whether to impose a sentence of preventive detention. This gives a clear indication to the judges that a detailed reflection on the criteria is expected in the judgment. Secondly, the principle of "ultima ratio", that is the principle of last resort, is now endorsed within the act: "a lengthy determinate sentence is preferable if this provides adequate protection for society."[70] The latest amendment has dispersed the last

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[67] See Geoffrey G Hall and Stephen O'Driscoll (presenters) *Seminar: The New Sentencing and Parole Acts* (New Zealand Law Society, Wellington, 2002) 71.
[68] Criminal Justice Act, s 75 (2) (repealed).
[69] Criminal Justice Act, s 75 (3A) (repealed).
[70] Sentencing Act 2002, s 87 (4) (e).

doubts one could have had regarding the arbitrariness of the legislation. It now provides clear guidance of how and when to impose preventive detention.

The sentence of preventive detention is thus not arbitrary.

2 *Other rights enshrined in article 9 ICCPR*

The principle of legality in article 9 (1) 3 of the Covenant is violated if the possible ground for detention is not unambiguously established in the law or the detention is contrary to this law.[71] The latter point is a question of the individual case, which is outside the scope of this paper. The former point refers to the legislation within the state, which is here the Sentencing Act 2002. However, the Sentencing Act as described above establishes clear and precise requirements when the sentence of preventive detention can be imposed. Hence, preventive detention does not infringe the principle of legality.

The remaining sections of article 9 encompass the rights of the arrested person in the case of pre-trial detention, such as to be informed of the reasons of arrest and of the charges against him/her. Accordingly these sections do not raise any issue for the sentence of preventive detention.

Only article 9 (4) of the Covenant could pose some concerns on preventive detention since it stipulates that the offender has the right to have the lawfulness of his or her detention examined by the court. Article 9 (4) of the Covenant is nearly identical to article 5 (4) of the European Convention which played a prominent role in the European Court's assessment of preventive detention. It will accordingly be studied below in the light of the European Court's decisions.

C ***Article 14 ICCPR – Rights to Fair Trial and Due Process***

Article 14 ICCPR establishes equality before the courts, the right to a fair and public hearing, and the minimum guarantees of the accused in criminal trials. Article 14 will in the following only be examined under the aspects the Committee put

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[71] Manfred Nowak *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (Engel, Kehl, 1993) 171, 172.

forward. Other due process rights enshrined in this article will be studied in connection to the comparison of other legislations.

1 The presumption of innocence, Article 14 (2) ICCPR

The presumption of innocence is an indispensable principle of fair trial.[72] The Human Rights Committee sought clarification regarding preventive detention from the New Zealand delegation in the light of "[article] 14 of the Covenant, particularly with respect to the presumption of innocence."[73]

The presumption of innocence is predominant in the criminal trial since part of this principle is the onus of the prosecutor to prove the defendant's guilt, and not for the defendant to prove his or her innocence.[74] After having established the decisive facts and argued the case, the court must in case of doubt find the accused not guilty pursuant to the principle of *in dubio pro reo*.[75] Connected to this principle is the way and the extent by which guilt is to be proved. Generally the court must be convinced beyond reasonable doubt of the guilt of the accused. This requirement, however, was not inserted in article 14 (2) of the Covenant. Such a proposition was defeated during the draft of the Convention.[76] Nevertheless, it seems to be an undisputed principle of a criminal trial that a judge or a jury may convict an accused only when there is no reasonable doubt of his or her guilt and New Zealand should apply this widely accepted standard.[77]

When considering whether to impose a sentence of preventive detention, the New Zealand High Court must be "*satisfied* that the person is likely to commit another qualifying sexual or violent offence if the person is released …"[78] The question arises what the use of the word "satisfied" exactly means, and whether proof beyond reasonable doubt is required. The wording of "satisfied" does not seem to require a proof beyond reasonable doubt. Indeed, the Court of Appeal held with reference to section 75 (2) Criminal Justice Act 1985 – the former provision

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[72] Manfred Nowak *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (Engel, Kehl, 1993) 253 para 33.
[73] See UN Human Rights Committee *Summary Record of the 1394th meeting: New Zealand* (07.05.1994) UN Doc CCPR/C/SR.1394 para 19.
[74] Nowak, above, 35.
[75] Nowak, above, 35.
[76] By a vote of 8:2, see Nowak, above, 35.
[77] See to the argument that this standard should be applied Nowak, above, 35.
[78] Sentencing Act 2002, s 87 (2) (c) (emphasis added).

relating to preventive detention – that "[t]he phrase 'is satisfied' means simply 'makes up its mind' and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification ..."[79] This indicates that proof beyond reasonable doubt was not necessary in deciding whether the person is likely to re-offend. In enacting the new provisions in the Sentencing Act 2002 the New Zealand Parliament can be seen as having approved the judgment of the Court of Appeal since the new act also uses the word "satisfied" without further qualification.

Does this lead to the conclusion that "preventive detention" infringes the principle of the presumption of innocence because proof beyond reasonable doubt is not necessary? Preventive detention can be imposed only on the person being tried and convicted of an offence. During his or her trial the offender is presumed innocent. All the facts of the case have been fully established and the court is convinced of the guilt of the accused beyond reasonable doubt; the following imposition of the sentence is not a matter of proof. The presumption of innocence only requires judge or jury to convict the accused when there is no doubt of his or her *guilt*. And the guilt of the offender has already been established, even before the judge considers the sentence of preventive detention.

Thus, article 14 (2) of the Covenant is not violated.

2 *The Prohibition of Double Jeopardy, Article 14 (7) ICCPR*

Article 14 (7) of the Covenant prohibits a person from being "tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[80]

The prohibition of double jeopardy played a major role in the decision of the Canadian Federal Supreme Court regarding the dangerous offender order in Canada, and some decisions of the European Court of Human Rights. Of course, these judgments were delivered under different human rights instruments but the principle of double jeopardy in the ICCPR or in the New Zealand Human Rights Act 1990

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[79] *R v White (David)* [1988] 1 NZLR 264, 268 (CA).

[80] ICCPR, art 14 (7); this is almost identical to the provision in the New Zealand Human Rights Act 1990, s 26 (2) "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again".

ought to be the same like in Europe and Canada. Accordingly, this will best be assessed below, in connection with these two jurisdictions.

D Article 15 ICCPR – Prohibition of Retroactive Criminal Law

1 Overview

An act can only be punishable under criminal law if the law forbids it. The prohibition of retroactive criminal laws is so an important right that it is *non-derogable* in the Covenant and in the regional Conventions on Human Rights.[81]

In his final remarks of the meeting of the New Zealand delegation and the Committee in 2002, the chairperson pointed out that the "continued practice of preventive detention … violated article 15 of the Covenant,"[82] and another member wanted to know "whether preventive detention was compatible with article 15 of the Covenant."[83]

Article 15 stipulates that "no one shall be held guilty of any criminal offence … which did not constitute a criminal offence … at the time when it was committed" and enshrines thus the prohibition of retroactive criminal law (*nulla crimen sine lege*).[84] Moreover, the rule against retrospective legislation forbids also the imposition of a penalty heavier that the one that was applicable at the time the offence was committed (*nulla poena sine lege*).[85] Both principles are so important rights of fair trial that they were set apart from the other rights of due process and fair trial in article 14 of the Covenant.[86]

Unfortunately, the Human Rights Committee did not define in what way and to what extent the sentence of preventive detention is likely to contravene Article 15 of the Covenant. The issue of retroactivity will therefore be scrutinised from both above-mentioned angles.

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[81] ICCPR, art 4 (2), and in Europe and the Americas see ECHR, art 15 (2) and ACHR, art 27 (2) respectively.

[82] See UN Human Rights Committee *Summary Record of the 2016th meeting: New Zealand* (15.07.2002) UN Doc CCPR/C/SR.2016 para 56 (comment by Prafullachandra Natwarlal Baghwati).

[83] See UN Human Rights Committee *Summary Record of the 2016th meeting: New Zealand* (15.07.2002) UN Doc CCPR/C/SR.2016 para 56 (Christine Chanet).

[84] ICCPR, art 15 (1) 1.

[85] ICCPR, art 15 (1) 2.

[86] The same applies for the European and American Conventions on Human Rights, see ECHR, art 7 and see ACHR, art 9.

2 *Nulla crimen sine lege, article 15 (1) 1 ICCPR*

Retroactivity was a key issue under the sexual offender legislation in the United States, which might have led the Committee to the assumption that it could be as well a subject of concern in New Zealand's legislation. The prohibition of retroactive criminal law is relevant in case the court sentences the offender to preventive detention under a new legislation after he or she had served his or her determinate sentence imposed under the old act. This is exactly the problem caused by the "civil" confinement legislation in the US, where the preventative detention of sexual offender was enacted shortly before the offenders have finished their sentence and long after they have been convicted of the offence. The US Supreme Court decided that the confinement of the offenders after their time in prison does not breach the prohibition of retroactive criminal laws, since the 'Sexual Predator Statutes' are civil, and not punitive in nature.[87] Yet, in the case of New Zealand's legislation, even though preventive detention is not civil in nature, this problem cannot occur because preventive detention is ordered by the court as sentencing option *directly subsequent* to the conviction and not at the end of the offender's detainment.

3 *Nulla poena sine lege, article 15 (1) 2 ICCPR*

Furthermore, the provision in the Sentencing Act 2002 could infringe article 15 of the Covenant if the offender is punished more severe than under the old act.[88] However, offenders are only eligible for the sentence of preventive detention since the act came into force. The Sentencing Act 2002 contains a transitional provision on the matter of how to deal with an offender convicted of a specified offence, which could entail preventive detention under the Criminal Justice Act 1985, committed before the commencement date of the new Act.[89] The Sentencing Act 2002 stipulates that the court could deal with the offender under the new Act if, "had the court been dealing with the offender immediately before the commencement date,

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[87] *Kansas v Hendricks* (1997) 117 S Ct 2072, decision reached by 5-4 votes, see further to this issue Adam J Falk "Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v Hendricks" (1999) 25 Am J Law & Medicine 117.

[88] It should again be noted that the Committee could not have this issue in mind when criticising preventive detention because the Sentencing Act 2002 came into force after the Committee's final observations.

[89] Sentencing Act 2002, s 153.

the court would have sentenced the offender to preventive detention under section 75 of the Criminal Justice Act 1985."[90] It means the court can only apply the new provision if the offender would also have been sentenced to preventive detention under the old legislation. As the sentence of preventive detention is in both cases indeterminate imprisonment, the *nulla poena* principle is not violated. It does not impose a more severe sentence on the offender than was possible at the time he or she committed the offence but rather the sentence was reduced in minimum terms from ten to five years and the system of parole eligibility was made more flexible under the new legislation.

Preventive detention in New Zealand does not violate article 15 of the Covenant.

E Summary

The assertion of arbitrariness could have been a valid argument for the previous legislation but the coming into force of the Sentencing Act 2002 provides the judges of the High Court with clear guidance of when to impose preventive detention. Furthermore, preventive detention does not infringe the presumption of innocence because this principle deals with the guilt of the offender, which is, in the case of preventive detention, established before the judge considers the sentence of preventive detention. The provisions of preventive detention are moreover not retroactive. Therefore, no ICCPR violation and thus no human rights violation could be detected so far.

In the following chapter, the survey of the legislation about 'dangerous offender' in Canada and Europe will turn out more areas of concern regarding preventive detention. In particular the principle of double jeopardy will be scrutinised in the light of a Canadian Supreme Court's decision. Furthermore, article 9 (4) of the Covenant will be examined in the light of the European Court's decisions on the equivalent article 5 (4) of the European Convention. Only after having compared the legislation of preventive detention in New Zealand with the legislation in Canada and in Europe, and the decisions of Canadian Supreme Court and the European Court of Human Rights, the assessment on preventive detention and the rights of the offender can be completed.

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[90] Sentencing Act 2002, s 153 (1) (b), (2).

V PREVENTATIVE DETENTION OF DANGEROUS OFFENDERS IN CANADA AND EUROPE

A Canada

The current Canadian system is like the preventive detention in New Zealand based on community protection. Similar to other jurisdictions, the Canadian community protection model emerged after the treatment and the justice model for the management of dangerous offender was rejected. In contrast to, for example, the US model, the Canadian Government decided not to differentiate sexual from non-sexual dangerous offender. Similar to New Zealand, the preventative detention for violent offenders is indeterminate and is determined already at the time of conviction and not at the end of their determinate sentence.[91]

This chapter first considers the question whether the UN Committee has commented on the Canadian legislation. It then gives an overview on the legislative history and the current provisions on very dangerous offender. Further, it analyses the legislation in the light of the Canadian Charter of Rights and Freedoms taking into account the decision of the Canadian Supreme Court, which is then applied to the system of preventive detention in New Zealand.

1 *Comments of the United Nations Committee*

The Canadian Government mentioned its dangerous offender legislation to the Committee in the second report and the Committee sought some clarification about it. The Canadian representative referred to a decision of the Supreme Court of Canada (the Supreme Court) in which it held that the legislation is compatible with the guarantees in the Canadian Charter of Rights and Freedoms (the Charter).[92] In the meeting to Canada's fourth report, the Canadian delegation was again asked to comment on the provision of indeterminate detention of high-risk offenders and the Canadian representative made clear that this measure applied only to serious violent crimes and "was imposed only after conviction and following a special hearing to

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[91] Consequently, the Canadian model is clearly located in the criminal system; there is no debate, like in the US on whether measures of detaining dangerous offender are criminal or civil in nature.

[92] Report of the Human Rights Committee to the General Assembly UN GAOR 46th Session Suppl No 40 UN Doc A/46/40 (1991) para 68.

assess whether the offender showed a pattern of violent behaviour constituting a long-term risk to society."[93] The Committee did not have further concerns and did not include this issue in its concluding observations.[94]

The paper scrutinises in the following the decision of the Supreme Court mentioned by the Canadian delegation but first gives a background to the legislation to facilitate the understanding of the Court's arguments.

2 *Legislative History*

Canada is an example of the three periods mentioned in the introduction of the paper. The dangerous offender legislation reflects a continuum from the clinical model, through the justice model to finally the current model of community protection.[95] Until 1977, the Canadian Criminal Code provided for the indeterminate detention of 'habitual offenders', which primarily targeted repeat property offenders and 'criminal sexual psychopaths' who were deemed to pose a high risk of re-offending in the future.[96] This legislation was criticised since the habitual offender legislation was mainly used on property offenders and the sexual offender legislation did not include non-sexual offenders. Moreover, critics showed that the legislation was applied inconsistently,[97] which was similar to the criticism of the Cabinet Policy Committee in New Zealand.

Accordingly, in 1977, the provision on habitual offenders was repealed and the sexual offender legislation was extended to include other dangerous violent offenders.[98] Pursuant to this legislation, a 'dangerous offender' was a person convicted of a 'serious personal injury offence', defined either as violent offence punishable by at least ten years imprisonment, or all types of sexual assault offences. This designation had to be done through a special court hearing, held soon after the

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[93] UN Human Rights Committee *Summary Record of the 1738th meeting: Canada* (07.03.1999) UN Doc CCPR/C/SR.1738 para 34 (Ms Beckton from Canadian delegation).
[94] See UN Human Rights Committee *Concluding Observations to fourth report: Canada* (07.04.1999) UN Doc CCPR/C/79/Add.105.
[95] For a brief history see *R v Johnson* (British Columbia Court of Appeal, 2001) CarswellBC 2128 at 15-22 (Ryan J).
[96] Isabel Grant "Legislating Public Safety: The Business of Risk" (1998) 3 Canadian Criminal Law Review 177.
[97] Clare Connelly and Shanti Williamson "A review of the Research Literature on Serious Violent and Sexual Offenders" (Scottish Executive Research Unit, Edinburgh, 2000) 3.10.
[98] See Correctional Service of Canada "Backgrounders – Dangerous Offenders" online available at <http://www.csc-scc.gc.ca/text/pubed/feuilles/dngoff_e.shtml> (last accessed 26.8.2003).

offender has been convicted. In addition there had to be evidence to persuade the court that the offender constituted a risk to others. To assess the risk of recidivism, one psychiatrist could be chosen by the prosecutor, the other one by the offender. Once found to be a "dangerous offender", the court had discretion on whether to impose a determinate or an indeterminate sentence. The indeterminate sentence had to be reviewed after three years and every two years thereafter. One fundamental new feature of this regime was that the preventive and punitive part of the sentence merged: the former legislation kept the punitive and preventive parts of the sentence distinct, yet under the new legislation punitive and preventive part was not distinguishable.[99]

In 1995, the legislation was amended again and stricter provisions were imposed after the sexual attack and murder of a young boy committed by a convicted psychopath who had been released.[100] An appointed joint Task Force on 'high-risk violent offenders' recommended key changes to the existing legislation.[101] The recommendations were enshrined in the Criminal Act 1985 and are in force since August 1, 1997.[102]

3 *The Decision of the Supreme Court of Canada in 'R v Lyons'*

The Supreme Court had to decide on the constitutionality of the dangerous offender provision in 1987. Since no case under the new legislation has yet reached the Supreme Court, the landmark decision in *R v Lyons*[103] from 1987 will be scrutinised and then the paper examines whether the sentence of preventive detention

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[99] Isabel Grant "Legislating Public Safety: The Business of Risk" (1998) 3 Canadian Criminal Law Review 177, 192.

[100] Grant ,above, 218-219.

[101] See Correctional Service of Canada "Backgrounders – High-Risk Offenders" online available at <http://www.csc-scc.gc.ca/text/pubed/feuilles/off-risk_e.shtml> (last accessed 26.8.2003).

[102] Department of Justice Website "Bill C-55 comes into force" <http://canada.justice.gc.ca/en/news/nr/1997/c55com.html> (last accessed 25.8.2003) It introduced five key amendments to the dangerous offender provision. First, the Bill introduced a multi-disciplinary assessment of the offender's dangerousness. This assessment replaced the two psychiatrists who were nominated by Crown and Defence and thus had frequently diverging opinion, complicating ultimately the court's decision-making. Secondly, if having designated an offender as dangerous offender the court must impose an indeterminate sentence; the court's former discretion on this point was removed. Thirdly, the first parole review was no longer to take place after three years but after seven years following the sentence. Fourthly, the application process, previously to be held soon after conviction, could be delayed up to six months after conviction, see Isabel Grant "Legislating Public Safety: The Business of Risk" (1998) 3 Canadian Criminal Law Review 177, 192.

[103] *R v Lyons* [1987] 2 SCR 309.

in New Zealand meet the requirements the Court has established regarding the prolonged detention of dangerous offender.

The Supreme Court of Canada considered in its decision sections 7, 9, 11 and 12 of the Canadian Charter of Rights and Freedoms (1982) (the Charter).

(a) Fundamental Justice, Article 7 of the Charter of Rights and Freedoms

Section 7 of the Charter states *inter alia* that every person has the right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice.

The appellant challenged the dangerous offender provision on three grounds of fundamental justice: the prohibition of not being punished twice for one offence, being punished not proportional to the guilt of the crime committed, and the want of a prior notification from the court that an dangerous offender order could be applied.

The prohibition of double jeopardy is here at stake even though the Supreme Court did not name it expressly. The Court held unanimously[104] that the section of the Criminal Code allowing for a dangerous offender application does not "permit an individual to be sentenced for crimes he or she has not committed or for crimes for which he or she has already been punished."[105] The Court reasoned that "the individual is clearly being sentenced for the 'serious personal injury offence' he or she has been found guilty of committing;" and only thereafter the person is "subjected to a procedure aimed at determining the appropriate penalty that should be inflicted upon him in the circumstances."[106] Moreover, the Supreme Court told the appellant that "the punishment … flows from the actual commission of a specific crime",[107] so that the individual is not being punished for what he might do in the future, but for the offence he has committed.[108]

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[104] Wilson J (dissenting in part) held that the lack of notification of the appellant that a dangerous offender designation is considered, does infringe article 7 of the Charter, see below. However, he did not dissent on the point of double jeopardy discussed here.
[105] Submission of the appellant, see *R v Lyons* [1987] 2 SCR 309, 327-328.
[106] *R v Lyons*, above, 328 La Forest J.
[107] *R v Lyons*, above, 328 La Forest J.
[108] *R v Lyons*, above, 311 La Forest J.

The Supreme Court admitted that the offender is sentenced "in a different way than would ordinarily be done",[109] but this does not infringe section 7 of the Charter. Fundamental justice is not violated by the decision of Parliament to punish dangerous offenders not only on the "objectives of rehabilitation, deterrence and retribution". In the circumstance of the individual case, these objectives can be "greatly attenuated … and that of prevention correspondingly increased."[110] It is not against fundamental justice in criminal law when Parliament decides that dangerous offender ought to be sentenced "not entirely based on a 'just desert' rationale"[111] because a preventative sentence "serves both a punitive and a preventative role and its purpose, the protection of society, underlies the criminal law in general and sentencing in particular."[112]

The Court unanimously held that the preventative detention of dangerous offender does not constitute a breach of the prohibition of double jeopardy, and that this kind of preventative detention does not infringe the principle of fundamental justice when taking the dangerousness of the offender into account during the sentencing process.

In addition, the appellant raised another issue of fundamental justice, namely the issue whether his right under Article 7 of the Charter was violated because he was not advised of the Crown's intention to make a dangerous offender application before his guilty plea.[113]

Offenders might have pleaded not guilty rather than guilty to the charges against them, if they had been forewarned of the Crown's intention. Nevertheless, the majority held that it is "difficult to articulate precisely in what sense the liberty interests of the appellant were infringed by the absence of [prior] notice…"[114] However, prior notification seems not necessary since "indeed, [the dangerous offender provision of the Criminal Code] itself can be seen to provide notification that the dangerous offender provisions are invocable if 'serious personal injury offences' are committed by an accused."[115]

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[109] *R v Lyons* [1987] 2 SCR 309, 328 La Forest J.
[110] *R v Lyons*, above, 329 La Forest J.
[111] *R v Lyons*, above, 311 La Forest J.
[112] *R v Lyons*, above, 311 La Forest J..
[113] *R v Lyons*, above, 370.
[114] *R v Lyons*, above, 371 La Forest J.
[115] *R v Lyons*, above, 372 La Forest J.

Wilson in his dissenting opinion argued, however, that an accused should know the full extent of his or her jeopardy before he pleads guilty to a criminal offence.[116] In his view, "[the accused] did not and could not have envisaged the making of the [dangerous offender] order."[117]

(b) Arbitrarily Detention, Article 9 of the Charter of Rights and Freedoms

Article 9 of the Charter contains the guarantee that everyone has the right not to be *arbitrarily* detained or imprisoned.

Considering the term of 'arbitrarily' the Court pointed out that the legislation applies only to a "narrowly defined class of dangerous offenders"[118] and that the criteria of an application to designate someone as dangerous offender are "anything but arbitrary in relation to the objectives sought to be attained; they are clearly designed to segregate a small group of highly dangerous criminals posing threats to the physical or mental well-being of their victims."[119] However, the appellant argued that prosecutorial discretion as to whether to proceed with a dangerous offender application caused a lack of uniformity in the treatment of dangerous persons and thus the process was arbitrary.[120] The court did not follow this argument, but rather "completely" seconds the Crown counsel's submission that " ... it is the absence of the [prosecutorial] discretion which would, in many cases, render arbitrary the law's application."[121]

(c) Jury Trial, Article 11 (f) of the Charter of Rights and Freedoms

Everyone charged with an offence has the right to a jury trial where the maximum punishment for the offence is imprisonment for five years or more.[122]

The jury trial issue amounts to one key question of preventive detention, namely whether the application to declare the offender a dangerous offender is

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[116] *R v Lyons* [1987] 2 SCR 309, 379 Wilson J dissenting.
[117] *R v Lyons*, above, 381 Wilson J dissenting.
[118] *R v Lyons*, above, 312 La Forest J.
[119] *R v Lyons*, above, 347 La Forest J.
[120] *R v Lyons*, above, 345-346.
[121] *R v Lyons*, above, 347 La Forest J.
[122] Canadian Charter of Rights and Freedoms, art 11 (f).

equivalent to *charging* the offender with an *offence*. The question arises whether the dangerous offender provision in criminal law constitutes a genuine offence.

The Supreme Court affirmed an earlier decision on this matter where the 'dangerous sexual offender' application of the former legislation was under scrutiny.[123] It held in *Wilband* that the issue of such dangerous offender provision is "not whether he is convicted of another offence, but solely whether he is afflicted by a state or condition that makes him a dangerous sexual offender… *To be so afflicted is not an offence.*"[124] The Court made it clear that the proceedings of habitual offender or dangerous sexual offender "do not involve the conviction of an offence, but the determination of the sentence which may be pronounced after conviction."[125]

In its decision of *R v Lyons*, the majority of the Supreme Court upheld this decision in the case of the new dangerous offender legislation.[126] Yet, Lamer J in his dissenting opinion found that the dangerous offender provision is very different from sentencing provisions.[127] He held that it is not the conviction for the personal injury offence that gives the judge the possibility to impose an indeterminate sentence, but the finding of dangerousness. Moreover, the finding of dangerousness gives him "new jurisdiction to impose a more severe sentence, indeed a drastically more severe sentence."[128] Hence, the status of being a dangerous offender is "an offence for the purposes of article 11 (f) [of the Charter]".[129]

(d) Cruel Punishment, Article 12 of the Charter of Rights and Freedoms

Section 12 of the Charter stipulates that everyone has the right not to be subjected to any cruel or unusual treatment or punishment.

The appellant contended that the indeterminate sentence under the dangerous offender order amounted to "a punishment that is unusually severe".[130] The Supreme Court recognised that there is a significant difference between the effect of a dangerous offender order and a determinate sentence. The convicted person in the latter case can "remain in a passive state, secure in the knowledge that he or she will

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[123] *Wilband v The Queen* [1967] SCR 14, 19-20 Fauteux J for the Court.
[124] *Wilband v The Queen*, above, 19 Fauteux J for the Court (emphasis added).
[125] *Wilband v The Queen*, above, 20 Fauteux J for the Court.
[126] *R v Lyons* [1987] 2 SCR 309, 353 La Forest J.
[127] *R v Lyons*, above, 373 Lamer J dissenting.
[128] *R v Lyons*, above, 375 Lamer J dissenting.
[129] *R v Lyons*, above, 374 Lamer J dissenting.
[130] *R v Lyons*, above, 334.

be released thereafter;" whereas for the offender serving an indeterminate sentence, "the sole hope is parole".[131] Thus, to assess whether the sentence constitutes an unusual and cruel punishment, the availability of parole is more a key factor in the case of an indeterminate sentence than in a determinate one, because subsequent to the imposition of preventative detention parole is the "sole protection of the dangerous offender's liberty interests."[132] The Supreme Court concluded that the availability of parole ensures that the incarceration is imposed only for as long as the dangerousness of the offender persists.[133]

(e) Summary

The decision of the Supreme Court demonstrates that the indeterminate confinement of very dangerous offender is in principle possible under the Charter, it does in particular not infringe upon the prohibition of double jeopardy. The legislation must, however, provide the offender with sufficient procedural safeguards.

Preventive detention in New Zealand must, of course, not comply with the Canadian Charter. Nevertheless, the New Zealand Bill of Rights was modelled on the Canadian Charter and the white paper to the Bill of Rights noted that "[t]his will be of major practical importance for New Zealand lawyers and courts will be able to draw on the rich and developing jurisprudence from Canada."[134] Thus, it is possible to apply the ideas and concerns of the Supreme Court to the New Zealand legislation. This is even more important since the Human Rights Committee had, other than in the case of the New Zealand legislation, no further concerns regarding the Canadian provisions on dangerous offender. Should preventive detention in New Zealand provide the dangerous offenders with more safeguards than the Canadian legislation, the Committee might have gone too far in its concerning remarks.

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[131] *R v Lyons* [1987] 2 SCR 309, 340 La Forest J.
[132] *R v Lyons*, above, 341 La Forest J.
[133] *R v Lyons*, above, 342 La Forest J.
[134] *A Bill of Rights for New Zealand – A White Paper* Appendix to the journals of the House of Representatives of New Zealand, 0110-3407; A.6 (Government Printer, Wellington, 1985) 10.2.

4 *Application of 'R v Lyons' on Preventive Detention in New Zealand*

Before applying the decision of the Supreme Court to the New Zealand system of preventive detention, the question arises whether the two regimes are at all comparable.

The New Zealand legislation is in many ways analogous to the Canadian one. The 'serious personal injury offence' is in New Zealand similarly defined as 'qualifying sexual or violent offence'. In both jurisdictions, dangerous offenders are sentenced to indeterminate imprisonment, but can be released if the parole board is convinced that the individual no longer represents a risk to the public. The decision of indeterminate sentence is moreover made directly subsequent to the conviction and not after the offender had served his time in prison for the index offence. These similarities lead to the fact that the decision of the Supreme Court of Canada should have some 'moral' impact on the New Zealand legislation.

(a) Double Jeopardy

The Supreme Court found that the dangerous offender order did not infringe the prohibition of the offender being convicted for an offence for which he or she has already been punished. Indeed, it is a standard way of sentencing to take into account the past convictions of a criminal when finding his or her appropriate sentence.[135] The sentence of preventive detention in New Zealand is not imposed on someone who was "picked up off the street because of his past criminality (for which he has already been punished),"[136] but rather the person was arrested and prosecuted for a violent crime. Hence, the sentence of preventive detention flows from the actual commission of a specific crime.

It is true, however, that the sentence of preventive detention departs from the ordinary way of sentencing, since its objectives are not solely rehabilitation, deterrence, and retribution; these are the general objectives enshrined in the

[135] See for New Zealand the Sentencing Act 2002, s 9 (1) (j).
[136] *R v Lyons* [1987] 2 SCR 309, 328 La Forest J.

Sentencing Act 2002 as "purposes of sentencing".[137] Rather, preventive detention accentuates the preventative purpose, that is protection of society.[138]

Connected to this – even among the judges of the Supreme Court highly debated – issue is the discussion of article 11 (f) of the Charter whether the offender should have the choice of a jury trial. In this context the majority[139] of the Supreme Court decided that a dangerous offender order is not a separate offence that could trigger the right to jury trial. The court reasoned that being afflicted by a state that makes someone dangerous does not constitute an offence.

This argument can be transferred to the double jeopardy issue of preventive detention: the offender is not being punished twice, that is for the committed offence and the dangerousness, because to be a dangerous offender does not entail an offence. The individual is punished for the offence only; the further detention is not based on the idea of punishment since the dangerousness does not constitute an offence. Hence, the taking into account of the dangerousness of the offender while considering the sentence does not punish the offender twice for one offence.

Preventive detention does not violate the principle of double jeopardy.

(b) Prior Notification

The judges of the Supreme Court of Canada did not hold unanimously that the notification of the offender before his or her guilty plea is not necessary. Wilson in his dissenting opinion resorted to "common sense" and asked what thought is in an accused's mind in deciding whether or not to plead guilty.[140] He mentioned that an accused would ask the question: "what is the worst that can happen to me if I am convicted of this offence?"[141] Since orders of preventive detention are rare, Wilson concluded that the accused could not know that the Crown would be seeking a dangerous offender order against him.[142]

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[137] Sentencing Act 2002, s 7 (h) rehabilitation; 7 (f) deterrence and s 8 .
[138] This purpose is also mentioned in the general purposes of sentencing in the Sentencing Act 2002, s 7 (g) but expressly repeated in the provision on preventive detention, Sentencing Act 2002, s 87 (1).
[139] However, Lamer J dissented in this point, see above.
[140] *R v Lyons* [1987] 2 SCR 309, 379 Wilson J dissenting.
[141] *R v Lyons*, above, 380 Wilson J dissenting.
[142] *R v Lyons*, above, 380-381 Wilson J dissenting.

Ultimately this issue must not be resolved for the case of preventive detention in New Zealand, since it is a statutory requirement that "[a] sentence of preventive detention must not be imposed unless the offender has been notified that a sentence of preventive detention will be considered, and has been given sufficient time to prepare submissions on the sentence..."[143] This shows that the New Zealand legislation acknowledges this issue and sees it as essential that the offender is notified beforehand. In this regard the offender is better protected in New Zealand than in Canada.

(c) Arbitrarily Detention

It has been already established above that preventive detention is not arbitrary. Regarding the discretion of the Canadian prosecutors whether or not to proceed with a dangerous offender order, it is notable that, in New Zealand, the sentence of preventive detention can be proposed either by the prosecutor or by the court on its own motion.[144] This power of the court should streamline the application of the dangerous offender provision. The offender is thus in New Zealand better protected against an arbitrarily decision than in Canada.

(d) Cruel Punishment

The Supreme Court held that the parole process "assumes the utmost significance" in assessing the implication on the offender's rights in case of an indeterminate sentence.[145] It is the "[parole] process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender."[146] Thus, the question when the offender will be eligible for parole is a key factor in regard to the offender's right to liberty.

The Canadian provision of preventive detention was criticised by the highly regarded scholar Isabel Grant[147] because no fixed sentence was determined for the underlying serious personal injury offence, so that it was impossible to have the decision on when the offender could apply to the parole board determined on an

[143] Sentencing Act 2002, s 88 (1) (a).
[144] Sentencing Act 2002, s 87 (3).
[145] *R v Lyons* [1987] 2 SCR 309, 341 La Forest J.
[146] *R v Lyons* , above, 341 La Forest J.
[147] Who was even cited in the Supreme Court's decision, see *R v Lyons* , above, 364.

individual basis.[148] None the less, the Supreme Court held that the "parole process save[d] the legislation from being successfully challenged."[149]

In this context, it is significant that the Sentencing Act 2002 rendered the parole process more flexible in New Zealand than the former legislation. First, the minimum period of imprisonment has changed from ten to five years. Secondly, to reflect the two components of the – punitive and preventive – sentence the minimum period must be the longer of the minimum period required to reflect the gravity of the offence or the one required to reflect the offender's risk for society.[150] Thus, the decision on parole ineligibility can be taken on an individual basis, established on the seriousness of the crime or the dangerousness of the offender.

5 Summary

The Supreme Court of Canada held that the preventative detention of an offender who poses a high risk on society does not infringe the principle of double jeopardy. To be constitutional, however, the system of parole is of paramount importance. The New Zealand legislation complies with the safeguards the Supreme Court held as indispensable and provides the offender with even more procedural protection. It is thus odd that the Human Rights Committee had concerns regarding the New Zealand legislation but did not deemed it as necessary to scrutinise in depth the "dangerous offender order" in Canada.

B Europe

The Supreme Court in Canada failed to clarify important issues. In particular, the Supreme Court did not raise the question of what power the parole board should be vested with to meet the right of the offender not to be detained longer than necessary. The European Court of Human Rights, however, had regard *inter alia* to this issue and its findings are discussed below. Moreover, the European Court addressed the issue put forward by Isabel Grant on whether the determination

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[148] Isabel Grant "Legislating Public Safety: The Business of Risk" (1998) 3 Canadian Criminal Law Review 177, 226.
[149] *R v Lyons* [1987] 2 SCR 309, 341 La Forest J.
[150] Sentencing Act 2002, s 89 (2).

of a fixed sentence for the underlying personal offence is indispensable to safeguard the human rights of the offender.

1 *Overview*

In the context of an ever-growing amalgamation and an ongoing integration of states into a European unity, more and more victims of human right violations file their complaint to the European Court of Human Rights (the European Court).[151] As the final decisions of the Court are binding,[152] one of the main factors in considering the legislation of preventive detention in Europe is the extent to which the provisions comply with the European Convention on Human Rights (the Convention).[153]

This chapter first introduces the relevant provisions of the Convention and then scrutinizes landmark judgments of the European Court that deal with the detention of dangerous offender.

2 *Relevant Provisions of the European Convention on Human Rights*

The key provisions of the Convention for the purposes of the preventive detention of dangerous offenders are article 5 (1) (a) and 5 (4):

> 5.1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> …
>
> 5.4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not so lawful.

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[151] The European Court of Human Rights is the supervisory body of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4.11.1950, entered into force 3.9.1953, 213 UNTS 221, ETS 5.

[152] See heading of European Convention on Human Rights, Art 46 and European Convention on Human Rights, Art 46 (1) which holds "The High Contracting Parties undertake to abide by the final judgment of the Court in any case where they are parties."

[153] Department of Health of England and Wales "Managing Dangerous People with Severe Personality Disorder – Proposal for Policy Development" (Home Office, London, 1999) 32; Clare Connelly and Shanti Williamson "A review of the Research Literature on Serious Violent and Sexual Offenders" (Scottish Executive Research Unit, Edinburgh, 2000) 6.2.

Article 5 (4) of the Convention is of particular interest since it is almost identical to article 9 (4) of the Covenant, which is applicable to New Zealand.

3 *Decisions of the European Court of Human Rights related to the Detention of Dangerous Offenders*

Unlike the chapter on preventative detention of dangerous offenders in Canada, this chapter does not focus on a specific legislation. Thus, it remains unclear if the legislations in Europe on the preventative detention of dangerous offender are at all comparable to the preventive detention provisions in New Zealand. Nevertheless, the key elements of the decisions and the main concerns raised by the European Court can be extracted and then applied to the system of preventive detention in New Zealand. Where necessary some further explanations of the specific domestic legislation will be given, however.

(a) Overview

The European Court of Human Rights has generally accepted the idea of detaining offenders in the case they pose a significant risk to the public, even longer than they normally would have received for their offence. In several decisions, beginning in the early eighties, the European Court recognized that retribution and deterrence are not the only factors determining a sentence but insisted that provisions to protect these offenders against arbitrary and unjustified prolonged detention are in place.

(b) Need for a conviction

The following two cases deal with detention on remand. They are nevertheless mentioned since they confirm an essential principle of the lawfulness of preventative detention. The European Court held that the imprisonment of persons who have not yet committed an offence is not allowed only on the premises of their dangerousness for the public.

In the case of *Lawless v Ireland*[154] the European Court had to decide on the preventative detention of a member of the Irish Republican Army. Under Irish law a person could be detained without trial if the Minister of the State believed that this person was "engaged in activities ... prejudicial to the preservation of public peace and order or to the security of the State."[155] The Irish Government claimed that if the purpose of the arrest or detention was to prevent the commission of an offence, it should not be necessary to have the intention of bringing the person to court.[156] The European Court, however, held unanimously[157] that it was not acceptable to detain someone for a crime not yet committed, only on the assumption that the person was member of a terrorist organisation and might commit an offence.[158] This decision was confirmed in 1997, when an applicant had been imprisoned under Lithuanian law that permitted preventive detention when there is[159]

> sufficient reasons to suspect that a person may commit a dangerous act, the elements of which are set out in Articles 75 [banditry], 227-1 [criminal association] and 227-2 [intimidation] of the Criminal Code of the Republic of Lithuania, and with a view to preventing the commission of such an act.

The Court held that "preventive detention of the kind found in the present case" is violating article 5 (1) of the Convention.[160]

These two decisions highlight the fact that a person can only be detained or imprisoned if an offence was committed; it is not possible to detain someone who *might* commit an offence. Preventive detention in New Zealand, however, is only available for persons who were found guilty beyond reasonable doubt of an offence; they are not detained for an offence they might commit in the future.

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[154] *Lawless v Ireland* (European Court of Human Rights Judgment of 1 July 1961) Series A No 3 (1979-80) 1 EHRR 15.
[155] State (Amendment) Act 1940, s 4, cited in *Lawless v Ireland*, above, ch "As to the facts" para 12.
[156] *Lawless v Ireland*, above, ch "The Law" para 10.
[157] *Lawless v Ireland*, above, ch "The Law" para 48.
[158] Clare Ovey and Robin White *Jacobs and White, The European Convention on Human Rights* (3ed, Oxford University Press, Oxford, 2002) 109.
[159] Code of Criminal Procedure (Lithuania), art 50 (1) (in force until 30 June 1997) cited in *Ječius v Lithuania* (European Court of Human Rights Judgment of 31 July 2000, App 34578/97) 35.
[160] *Ječius v Lithuania*, above, 51.

(c) Arbitrariness and the requirement of a causal connection to the conviction

In several decisions, the European Court held that if the person is found guilty of an offence, an indeterminate sentence on the grounds of the dangerousness of the offender is not arbitrary and thus permissible provided there is sufficient causal connection with the conviction.

In *Van Droogenbroeck*, the applicant was sentenced to two years' imprisonment for theft and the court ordered further that he be "placed at the Government's disposal" for ten years because he "manifested a persistent tendency to crime".[161] The Government's disposal meant that he could be detained by executive order. The two parts of the sentence constituted under Belgian law "an inseparable whole".[162] After having served his two-year sentence, the applicant was again and again detained by administrative decision for several years on the base of the original sentence.[163]

The issue in the case was whether it would have been a violation of article 5 (1) of the Convention if the detention during the ten-year period were not related to the initial sentence because the detention would then not occur "after conviction".[164] The European Court held that it would be arbitrary if the detention, that was lawful at the outset, lost its link to the court's decision.[165] However, the Court argued that the there was a sufficient causal connection between the administrative decision and the original conviction.

Similar to *Droogenbroeck*, the European Court assumed in *Weeks*[166] that "the causal link required by [Article 5 (1) (a) of the Convention] might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the sentencing court."[167] Mr. Weeks was sentenced to a discretionary life sentence after having committed, at the age of 17, a robbery in which he stole 35 pence using a started pistol loaded with blank cartridges.[168] This sentence was passed because the trial

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[161] *Van Droogenbroeck v Belgium* (European Court of Human Rights Judgment of 24 June 1982) Series A No 50 (1982) 4 EHRR 443 para 9.
[162] See *Van Droogenbroeck v Belgium*, above, paras 21 and 39.
[163] *Van Droogenbroeck v Belgium*, above, paras 10-13.
[164] European Convention on Human Rights, art 5(1)(a).
[165] *Van Droogenbroeck v Belgium*, above, para 40.
[166] *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293.
[167] *Weeks v United Kingdom*, above, para 49.
[168] *Weeks v United Kingdom*, above, para 12.

judge declared that the applicant was "a very dangerous young man",[169] and he could be released on licence only when no longer a threat to community.[170] He was not released on licence for nearly ten years and after release recalled by the Home Secretary after committing minor offences. Despite the considerable time elapsed the Court held that the connection had not been broken.[171]

In New Zealand, however, the offender is not, like in *Droogenbroeck* or *Weeks*, detained by an administrative decision that bases on the conviction. The detention for the dangerousness is rather directly connected to the conviction since preventive detention is a sentencing option. Thus, the causal connection of conviction and detention does not cause any concern in New Zealand.

(d) Right to attend the hearing and to bring a counsel

In *Kremzow*, the Court held that in a proceeding of such crucial importance for the applicant as the his deprivation of liberty and where his character and state of mind is assessed, "it was essential to the fairness of the proceedings that he be present during the hearing of the appeals and afforded the opportunity to participate in it together with his counsel."[172]

The Parole Act 2002 acknowledges the necessity of procedural safeguards and in particular the right to attend the hearing and to bring a counsel.[173] Even if the Board decides to organise an unattended hearing where the offender is not present, the offender will have procedural safeguards, such as a review of the decision[174] and the right of being interviewed before the hearing with one member of the Parole Board in attendance of a support person.[175]

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[169] Quote of Trial Judge cited in *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293, para 14.
[170] *Weeks v United Kingdom*, above, para 46.
[171] *Weeks v United Kingdom*, above, para 51.
[172] *Kremzow v Austria* (European Court of Human Rights Judgment of 21 September 1993) Series A No 268-B (1994) 17 EHRR 322 para 67.
[173] Parole Act 2002, s 49 (3) (a) and (c) respectively.
[174] Parole Act 2002, s 46.
[175] Parole Act 2002, s 47 (1) and (4) respectively.

(e) Test of dangerousness during the period of imprisonment

In *Weeks* and in *Thynne, Wilson and Gunnell*, the European Court raised the question whether the detention is unjustified if the individual's characteristics that lead to preventative detention, such as recidivism or dangerousness, are not tested before a court since these qualities are "susceptible to change over the passage of time."[176]

The European Court held in *Weeks* that if a sentence relied on facts that, "by their nature, were susceptible to change in the future", "namely [the offender's] instability and dangerousness", the offender was entitled to have the lawfulness of the deprivation of liberty tested "at reasonable intervals during the course of [the offender's] imprisonment."[177]

The Court confirmed this judgment in the case of *Thynne, Wilson and Gunnell*. The applicants served each an indeterminate life sentence for sex offences; the domestic courts considered them "to be mentally unstable and dangerous,"[178] and all applicants were sentenced to life because, "in addition to the need for punishment, [they were] considered by the courts to be suffering from a mental or personality disorder and to be dangerous and in need of treatment."[179] The discretionary life sentence imposed by the English courts constitutes of two distinct parts: first a "tariff period" that is the punitive factor to satisfy the needs for deterrence and retribution,[180] and second the period after the tariff that is the preventive part to satisfy the needs for security and protection of the community.[181]

The applicants complained *inter alia* a violation of article 5 (4) of the Convention since they were not able to have the lawfulness of their detention decided "by a court at reasonable intervals throughout their imprisonment" as decided in *Weeks*.[182] The European Court held again that the ongoing detention after the expiry of the punitive period of the life sentence is comparable to the cases of *Weeks* and *Van Droogenbroeck* in that the factors of unstable and dangerous behaviour is

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[176] *Thynne, Wilson, and Gunnell v United Kingdom* (European Court of Human Rights Judgment of 25 October 1990) Series A No 190 (1991) 13 EHRR 666 para 80.
[177] *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293 para 58.
[178] *Thynne, Wilson, and Gunnell v United Kingdom*, above, para 65.
[179] *Thynne, Wilson, and Gunnell v United Kingdom*, above, para 72.
[180] See *Thynne, Wilson, and Gunnell v United Kingdom* (European Court of Human Rights Judgment of 25 October 1990) Series A No 190 (1991) 13 EHRR 666 paras 66 and 65.
[181] See *Thynne, Wilson, and Gunnell v United Kingdom*, above, para 73.
[182] *Thynne, Wilson, and Gunnell v United Kingdom*, above, para 64.

"susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention."[183]

In contrast to these decisions, the European Court held in *Wynne*[184] that not every sentence must be reviewed by a court. It had to consider if the findings in the above-mentioned cases are transferable to the mandatory sentence of life imprisonment imposed in the case of murder. The indeterminate sentence was significantly different from the – also indeterminate – discretionary sentence as it is solely based on the grounds of the seriousness of the offence (murder) but the dangerousness of the offender does not play a role in the sentencing consideration. Thus, offenders are not eligible to have their detention reviewed on the grounds that their characteristics have changed over time. The original trial and appeal proceedings satisfy the requirements of article 5 (4) in the case of a mandatory life sentence.

It is arguable whether the imprisonment related to the sentence of preventive detention in New Zealand must be tested by a competent court. The question that arises is whether preventive detention in New Zealand is comparable to the regime of a discretionary life sentence as considered in *Weeks*, and *Thynne, Wilson and Gunnell* or whether it resembles the case of *Wynne* where an offender is sentenced to life imprisonment and the sentence is mandatory under national law, so that a regular review is not necessary.

It could be argued that the Sentencing Act 2002 makes the sentence of preventive detention almost mandatory: the judge is barely able to sentence the offender not to preventive detention if satisfied that he is a dangerous offender, thus it can be deduced that preventive detention is a mandatory sentence and a review not necessary. Yet, the Sentencing Act 2002 stipulates that "the High Court *may* ... impose a sentence of preventive detention on the offender"[185], indicating that the judges do not need to impose preventive detention even if the offender is deemed dangerous.

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[183] *Thynne, Wilson, and Gunnell v United Kingdom* (European Court of Human Rights Judgment of 25 October 1990) Series A No 190 (1991) 13 EHRR 666 para 76.
[184] *Wynne v United Kingdom* (European Court of Human Rights Judgment of 18 July 1994) Series A No 290-A (1995) 19 EHRR 333.
[185] Sentencing Act 2002, s 87 (2).

However, even if it could be concluded that preventive detention is a mandatory sentence as it is imposed automatically if the offender has committed a qualifying sexual or violent offence and the court is satisfied that the offender is likely to commit another offence, the consequence is not necessarily that preventive detention in New Zealand is similar to the provision dealt with in *Wynne*. Ultimately, it cannot be decisive whether the sentence is mandatory or not, but whether "the nature and purpose of that sentence are such as to require the lawfulness of the continued detention to be examined by a court."[186] The discretionary life sentence's purpose is of punitive and preventive nature; the preventive detention's purpose is alike. It is significant that in both sentences the offenders' trait, for which they are kept in prison, is their dangerousness, which may change in the future. Accordingly new issues of lawfulness may arise and the offender must have the possibility in New Zealand to have the detention reviewed.

In New Zealand offenders can have their sentence of preventive detention reviewed by a parole board as soon as their minimum time of imprisonment has expired.[187] The question remains, however, whether the parole board is vested with enough power to be a "court" in the sense of article 5 (4) of the Convention.

(f) What is a "court" in the sense of article 5 (4) of the Convention?

The European Court had to decide what powers are required to be a "court" in the sense of article 5 (4) of the Convention.

In *Weeks*, the applicant complained that he had not been able to take his case at reasonable intervals throughout his detention before a court as required in article 5 (4) of the Convention.[188] The decisive question was whether the parole board was a "court" within the meaning of article 5 (4) of the Convention. In earlier cases, the European Court decided that a "court" in article 5 (4) does not necessarily have to be a "court of law of the classic kind",[189] but it should be independent both from the

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[186] See *Singh v United Kingdom* (European Court of Human Rights Judgment of 21 February 1996) Report 1996-I para 60 where the ECHR had to decide whether the indeterminate detention for young offenders "during her Majesty's pleasure" in the UK is mandatory and must regularly be reviewed.
[187] Parole Act 2002, ss 20 (1) (a), 84 (2), Sentencing Act 2002, s 89 (1).
[188] *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293 para 54.
[189] See *X v United Kingdom* (European Court of Human Rights Judgment of 24 October 1981) Series A No 46 (1982) 4 EHRR 188 para 53.

executive and the parties of the case,[190] and offer certain procedural guarantees "appropriate to the kind of deprivation of liberty in question."[191] Thus, there is in general nothing to preclude a parole board from being a "court" in the sense of article 5 (4) of the Convention.[192]

The European Court was confronted in *Weeks* with the issue that the parole board in the UK of that time could merely advise the Home Secretary on the exercise of his or her power of release.[193] The 'recommendations' of the parole board were "without doubt purely advisory".[194] Article 5 (4) of the Convention, however, stipulates that the court shall "decide" on the "lawfulness of his detention" and "order his release" if the detention is unlawful. A purely advisory power to issue recommendations to a member of the executive does not satisfy the Convention's guarantees. The Court confirmed this finding in *Thynne, Wilson and Gunnell* and concluded again that the parole board established under UK law is not endowed with the power to release someone in case its dangerousness can no longer be established, and held that the detention of the applicants as a consequence of their dangerousness violated article 5 (4) of the Convention.[195]

In New Zealand, the dangerousness of the offender is, once eligible for parole, tested by the New Zealand Parole Board. It is an independent statutory body,[196] and chaired by a High Court Judge.[197] Unlike the parole boards in the above-mentioned judgments, the New Zealand Parole Board does not have only the power to recommend release but it makes the decision of when to release the offender and under what conditions.[198] Thus, the New Zealand Parole Board has the power to decide about the lawfulness of the detention and is able to order the release.

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[190] *Neumeister v Austria* (European Court of Human Rights Judgment of 27 June 1968) Series A No 8 (1979-80) 1 EHRR 91 chapter "The Law" para 24.
[191] *De Wilde, Ooms and Versyp v Belgium* (European Court of Human Rights Judgment of 18 June 1971) Series A No 12 (1979-80) 1 EHRR 373 para 76.
[192] *X v United Kingdom* (European Court of Human Rights Judgment of 24 October 1981) Series A No 46 (1982) 4 EHRR 188 para 61.
[193] See quotation of the respective UK act in *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293 para 28.
[194] *Weeks v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293 para 64.
[195] *Thynne, Wilson, and Gunnell v United Kingdom* (European Court of Human Rights Judgment of 2 March 1987) Series A No 114 (1988) 10 EHRR 293 para 80.
[196] Parole Act 2002, s 108 (1).
[197] Parole Act 2002, s 112 (1).
[198] The parole board in New Zealand (at the time not yet named New Zealand Parole Board) received the power to release offenders in 1985 through the Criminal Justice Act 1985, see above.

(g) Review at regular intervals

In the *Oldham*[199] case, the European Court ruled that a two-year interval between reviews of detention was in general too long to be "speedy" in the meaning of article 5 (4) of the Convention. Whether the circumstances of this case are comparable to the preventive detention regime in New Zealand must ultimately not to be decided since the New Zealand Parole Board has to normally consider every offender detained in a penal institution in New Zealand "at least once every 12 months after the offender's last parole hearing."[200] One possible exemption from this 12-month-rule is a 'postponement order' under section 27 of the Parole Act 2002 when no significant change of the offender's circumstances are likely; this order can postpone a parole hearing for a maximum of three years in the case of preventive detention.[201] Nevertheless, the offender may apply for a hearing on the grounds that there have been a significant change.[202]

(h) Distinction of preventive and punitive part of the sentence

The European Court of Human Rights has interpreted the Convention in *Droogenbroeck,* in *Weeks,* and in *Thynne, Wilson and Gunnell* as requiring the sentencing court to specify which part of the sentence is punitive, representing the deterrence and just desert factor, and which part is preventive, representing the issue of mental instability or dangerousness.[203] The reason for this distinction is to enable the offender to have the prolonged detention, which is based on aspects of the offender's character that might change in the future, reviewed by an independent 'court'. This is similar to the above-mentioned claim of Isabel Grant that there should be a fixed sentence determining the underlying serious personal injury offence.

The New Zealand Sentencing Act 2002 seems indeed to acknowledge this issue when indicating that the sentencing court must order a minimum period of

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[199] *Oldham v United Kingdom* (European Court of Human Rights Judgment of 26 September 2000, app 36273/97) (2001) 31 EHRR 34.
[200] Parole Act 2002, s 21 (2).
[201] Parole Act 2002, s 27 (2) (a).
[202] Parole Act 2002, s 27 (3).
[203] See Clare Connelly and Shanti Williamson "A review of the Research Literature on Serious Violent and Sexual Offenders" (Scottish Executive Research Unit, Edinburgh, 2000) 6.11.

imprisonment,[204] whereby this minimum period should "reflect the gravity of the offence".[205] Had the Sentencing Act 2002 stopped there, the requirements of the European Court would have been met: the minimum period would have been the punitive part of the sentence marking the aspects of proportionality and just desert, and after the expiry of that minimum period the offender would be for the first time eligible for parole and regularly thereafter – the core requirement for the legitimacy of the preventive part of the sentence.

Yet, the Sentencing Act 2002 stipulates that the minimum period of imprisonment can also be "the [period] required to reflect the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing."[206] If offenders receive the minimum period because of the risk they pose on the safety of the society, the important distinction of what constitutes the punitive and what the preventive part of the sentence is blurred. The European Court declared the necessity that their confinement must regularly be tested during the time offenders serve in prison because of their dangerousness to the public good. Under the New Zealand Sentencing Act 2002, however, the dangerousness of the offender is not tested when the minimum period was imposed not for the gravity of the crime but for the safety of society in the sense of section 89 (2) (b). Thus, the New Zealand Sentencing Act 2002 fails the test of article 5 (4) of the European Convention on Human Rights.

4 Summary

Preventive detention is, in the view of the European Court, a possible answer to the problem of dangerous offender. Similar to Canada, the uttermost importance is laid on the opportunity to review the dangerousness before a competent court because it is susceptible to change in the future. The New Zealand Parole Board is vested with enough power to review the sentence of the criminal regularly and to release him or her when no longer a risk to society. It thus complies with the requirements the European Court poses on a 'court'. However, the Sentencing Act 2002 infringes article 5 (4) of the Convention and violates thus also article 9 (4) of

[204] Sentencing Act 2002, s 89 (1).
[205] Sentencing Act 2002, s 89 (2) (a).
[206] Sentencing Act 2002, s 89 (2) (b).

the Covenant because it is not clearly identifiable when the imprisonment for the offence ends and when the imprisonment because of the dangerousness begins.

VI CONCLUSION

Preventive detention tries to make a compromise between the competing rights of the society to be protected from very dangerous and violent offenders and the offenders' right to liberty and fair trial. It is out of the scope of this paper to address the issue of which specific articles of the Covenant guarantee the right of people to be protected from dangerous offender but this right is an inherent part of criminal law.[207]

The Supreme Court of Canada and the European Court of Human rights generally accept the prolonged confinement of an offender whose dangerousness causes a problem to the public's safety. Thus, the idea of preventive detention to detain the very dangerous offender indefinitely does not "[fly] in the face of modern theories and principles of criminal jurisprudence" as alleged by the Committee's chairman. It is rather expression of the community protection model that has become a worldwide phenomenon; and both the Canada Supreme Court and the European Court of Human Rights accept the general idea of preventive detention that just desert and proportionality are not the only factors to take into account in the sentence. Several safeguards, however, must be in place.

Preventive detention in New Zealand acknowledges most of the safeguards set up by the Supreme Court and the European Court and goes even beyond them. The Parole Act 2002 endows the New Zealand Parole Board with enough power to release the offender when no longer deemed dangerous, an essential fact highlighted by several decisions of the European Court. The Sentencing Act 2002 together with the Parole Act 2002 also provide the offender with sufficient procedural safeguards to guarantee the offender fundamental fair trial rights, such as to be present at the hearing and to bring a counsel.

The provision of preventive detention in New Zealand is, at least since the coming into force of the Sentencing Act 2002, not arbitrary. Additionally, it does not

[207] See the Canadian Supreme Court on this issue in *R v Lyons* [1987] 2 SCR 309, 311 La Forest J.

infringe the principle of the presumption of innocence because the offender's guilt has been established in the usual way before the sentence is imposed. It causes further, unlike for example the US legislation, no concern of retroactivity.

The arguments of the Canadian Supreme Court proved that the principle of double jeopardy is not at stake since the offender is punished for the crime he or she has committed and not what he or she might commit in the future. The dangerousness is taken into account only in the stage of sentencing and constitutes not a separate offence.

To highlight the difference between the imprisonment for the offence and the confinement for the aspects of the offender's character that is susceptible to change in the future, the European Court demands a clear differentiation in the sentence itself so as to enable offenders to have their detention reviewed by a competent court as soon as the punitive time in prison is over. This claim is based on article 5 (4) of the European Convention, which is almost identical to article 9 (4) of the Covenant. Unfortunately, section 89 (2) of the Sentencing Act 2002 opens the possibility for the New Zealand High Court to set the minimum time for imprisonment not only on the gravity of the offence but also on the period needed to protect the public from the risk posed by the offender. This blurs the line drawn by the European Court that the offender's dangerousness is likely to change with the time, and must thus be reviewed as soon as his or her confinement in relation to his or her dangerousness begins.

Preventive detention thus violates the fair trial right of the offender enshrined in article 9 (4) of the International Covenant on Civil and Political Rights. Section 89 of the Sentencing Act 2002 should be amended so that the minimum period can only be set in regard to the gravity of the offence – representing the punitive part of the sentence

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