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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its ninety-third session, 30 March–8 April 2022**

### **Opinion No. 7/2022 concerning Leonard Peltier (United States of America)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work,<sup>1</sup> on 10 December 2021 the Working Group transmitted to the Government of the United States of America a communication concerning Leonard Peltier. The Government replied to the communication on 11 February 2022. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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<sup>1</sup> A/HRC/36/38.

## Submissions

### *Communication from the source*

4. Leonard Peltier is a citizen of the United States and an indigenous activist. He is a member of the Chippewa and Lakota Nations. Mr. Peltier was arrested on 6 February 1976, at the age of 32, in Alberta, Canada and extradited to the United States to face murder charges. He was convicted and received two consecutive sentences of life imprisonment. At the time of the petition, Mr. Peltier was 75 years old and had been imprisoned for 44 years, originally based on a murder conviction. The source reports that he has been continually denied parole on the basis of unproven allegations of aiding and abetting. He is currently detained at United States Penitentiary Coleman I in Florida.

5. Mr. Peltier suffers from multiple serious health conditions that have not been and cannot be appropriately treated in prison. These include kidney disease, a heart condition, diabetes, high blood pressure, bone spurs, a degenerative joint disease, shortness of breath and dizziness, painful injuries to his jaw and near blindness in one eye due to a stroke. Several of these conditions put Mr. Peltier at high risk of death from coronavirus disease (COVID-19) while detained.

#### a. Background

6. According to the source, at the age of 9, United States government agents forcibly took Mr. Peltier from his grandmother to a boarding school run by non-Native Americans in order to strip him of his connection to his culture. At the school, he was beaten and forbidden to speak his indigenous language or talk to his younger sister and cousin. After leaving school, Mr. Peltier worked as a mechanic and provided addiction counselling to Native Americans.

7. Mr. Peltier was reportedly a member of the American Indian Movement, an organization founded in the late 1960s to foster a renewal of spirituality of indigenous people in the Americas, to create opportunities for indigenous people and build their self-determination, to combat injustices and to use the judicial system to protect the rights of indigenous peoples. At the time of the 1975 events in South Dakota that led to Mr. Peltier's conviction, the Movement was in conflict with the United States Federal Bureau of Investigation.

8. The Working Group was informed through a petition submitted on behalf of Mr. Peltier in 2004 of the events surrounding his trial for the murder of two Federal Bureau of Investigation agents on the Pine Ridge Reservation.<sup>2</sup> Mr. Peltier's case was allegedly tainted by government misconduct when he was extradited from Canada on the basis of false affidavits obtained through coercion of an indigenous woman, who was not present in the area of the crime. Mr. Peltier's trial was originally to be overseen by the same judge who presided over an earlier trial that resulted in the acquittal of his co-defendants. However, his case was moved, at the Government's request, to a judge who had previously presided over a criminal trial that was overturned as a result of his use of anti-indigenous stereotypes in his instructions to the jury.<sup>3</sup> The source claims that Mr. Peltier was convicted of murder after the judge excluded evidence of coercion of witnesses on the part of the Federal Bureau of Investigation and on the basis of evidence that was later discovered to have been manufactured. A ballistics report that the appeal judge found to be among the strongest evidence of Mr. Peltier's guilt was later found to be false through Freedom of Information Act litigation.

#### b. New facts

9. Although the Working Group held in 2005 that the problems with Mr. Peltier's trial and his unusually long sentence were insufficient to show that his detention was arbitrary, in

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<sup>2</sup> Mr. Peltier's case was considered in opinion No. 15/2005 (E/CN.4/2006/7/Add.1).

<sup>3</sup> United States Court of Appeals for the Eighth Circuit, *United States v. Lavallie*, 666 F.2d 1217, 18 December 1981.

the 17 years since that opinion, more information has come to light regarding the pattern of procedural and substantive injustice that Mr. Peltier has experienced.

10. Mr. Peltier's detention has been prolonged by parole officials who have departed from guidelines and failed to follow regulations pertaining to his parole proceedings. This, in addition to the influence of the Federal Bureau of Investigation over the case, is the reason why he remains in detention during the COVID-19 pandemic, which is a threat to his life.

c. United States Parole Commission

11. At the time of Mr. Peltier's sentencing in 1977, all federal prisoners were eligible for parole after serving a maximum of 10 years, and actual release dates were managed largely by the Parole Commission. In the late 1970s, about 70 per cent of release dates were set by the Parole Commission on a discretionary basis during incarceration, rather than determined at sentencing. Although Mr. Peltier was initially given two life sentences by the court, his eligibility for parole in the context of correctional practices at that time warranted the expectation that an actual release date would be set at some point. In 1985, a year before Mr. Peltier was eligible for parole, the average time served by federal prisoners released on parole after being sentenced to life imprisonment was 8.8 years.

12. In 1984, the United States Sentencing Reform Act changed the way sentencing functioned at the federal level and abolished parole for anyone sentenced in the federal system after 1984. The sentencing model in which actual time served was often decided by the Parole Commission rather than the sentencing court was abandoned in favour of fixed prison terms. The Act established a five-year transition period. At the end of the transition period in 1990, the Judicial Improvements Act extended the life of the Parole Commission until 1997 for the primary purpose of continuing to oversee parole consideration for convictions prior to the implementation of the Act. The Commission has since been renewed several times, and it is still active for that specific purpose.

d. Denial of consideration for release and due process rights

13. Since the beginning of his sentence, Mr. Peltier has suffered a series of violations of the due process rights guaranteed to prisoners seeking parole under United States law. In 1977, the Parole Commission implemented a procedure requiring that prisoners with no minimum sentence be informed of their "presumptive parole" release date. However, Mr. Peltier was never informed of his presumptive parole date, as required.

14. In 1981, the Parole Commission updated its mechanism for evaluating prisoners for parole, but Mr. Peltier was not evaluated according to the new standard. This generated uncertainty about his release date, which would have been clarified if the appropriate protocols had been followed.

15. In 1984, when the United States Sentencing Reform Act was implemented, Mr. Peltier was one of the prisoners who, by law, should have received a release date during the five-year transition period. This release date would have been approximately in 1992. However, to date, Mr. Peltier has not been given a release date.

e. Parole Commission excluded and contradicted facts

16. According to the source, Mr. Peltier has had two full parole hearings and four interim hearings. At none of these hearings did the Parole Commission substantively review the suitability of his confinement. At each hearing, the Parole Commission denied Mr. Peltier's parole, either without considering the full trial record or based on facts contradicted by it.

17. Mr. Peltier became eligible for parole on 21 December 1986, but his first full parole hearing was not held until 14 December 1993. At that hearing, the Parole Commission stated that his aggregate guideline range for release on parole was 188+ months. Even though Mr. Peltier had already served significantly more than 188 months, the Commission ordered that he remain in prison for at least 15 more years until a reconsideration hearing in 2008. That next hearing would be after 394 months of imprisonment, more than double the parole guideline.

18. The Commission's 1993 decision to deny parole was made on the recommendation of a parole hearing examiner who did not have full access to the facts of the case. The examiner recommended denying parole because Mr. Peltier had "committed murders". However, at the time, he was not aware that the Government had previously conceded that it could not prove that Mr. Peltier was the person who had killed the Federal Bureau of Investigation agents. The prosecutors had acknowledged in 1978 that they did not know who specifically fired the killing shots, and the facts did not directly indicate the person responsible for the killing.

19. In 1995, during Mr. Peltier's interim parole hearing, his lawyer provided the parole hearing examiner with access to additional information about misconduct and fabrication of evidence on the part of the Federal Bureau of Investigation, revealed on appeal and through Freedom of Information Act litigation. As a result, the parole hearing examiner retracted his previous recommendation, noting that the evidence did not prove that Mr. Peltier had "fired the fatal bullets into the agents" and, in particular, that on appeal, the prosecution "had acknowledged that the Government does not know insofar as having evidence to sustain the conviction in court" that Mr. Peltier murdered the officers. As a result, he concluded that Mr. Peltier's incarceration was unfounded and could not proceed without being "independently supported by a preponderance of the evidence" finding that Mr. Peltier had committed the murders.

20. In response to this recommendation, the Parole Commission appointed a second hearing officer, who had not been present at Mr. Peltier's interim hearing, to review the matter. Contradicting the previous findings, the second hearing officer recommended upholding the 15-year reconsideration period. The Commission ignored the previous conclusions and instead accepted the recommendation of the second officer, denying parole.

21. According to the source, it later emerged that the first parole hearing examiner had been demoted after submitting his recommendation, in retaliation for putting forward a favourable parole decision for Mr. Peltier.

22. Mr. Peltier had three other interim hearings between his first full hearing in 1993 and his second full hearing in 2009. He was denied parole at all three hearings. At the interim hearing held on 12 June 2000, the examiner did not even read or examine arguments from Mr. Peltier's lawyers, including a report from a physician documenting his health risks. The examiner wrote the recommendation to deny parole before the hearing was concluded, in violation of the Parole Commission's stated protocols.<sup>4</sup>

23. According to the source, before Mr. Peltier's second full parole hearing on 28 July 2009, his lawyer informed him that the Government had said that it would not oppose the motion for parole. In addition, a representative of the Parole Commission had told Mr. Peltier before the hearing that if his medical conditions – already severe by that time – persisted, he would be considered a suitable candidate for parole. At the hearing, however, the Government opposed parole. Despite Mr. Peltier's serious medical problems, the Commission again denied him parole. The explanation offered by the Commission for this denial in 2009 differed from that given in 1993. In 1993, the Commission had adopted the rationale that release could not be granted because Mr. Peltier had "committed murders". In 2009, the Commission instead used language that was consistent with a theory of aiding and abetting, alleging that Mr. Peltier had been involved in the killings, rather than having committed them himself. An appeal by Mr. Peltier in February 2010 was denied on similar grounds.

24. The source highlights the fact that Mr. Peltier was never convicted of aiding and abetting the murders. Under United States law, aiding and abetting is a separate offence, with separate elements that must be proven to a jury beyond reasonable doubt. The jury did not find Mr. Peltier guilty of aiding and abetting. Instead, the jury convicted Mr. Peltier of first-degree murder, the very crime the Government has since admitted Mr. Peltier cannot be proven to have committed. The Commission's recommendation in 2009 that Mr. Peltier remain incarcerated for another 15 years was based on claims inconsistent with his actual conviction.

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<sup>4</sup> The Parole Commission requires decisions to be made "at the conclusion of the hearing".

## f. Parole Commission's reasons for denial

25. The source claims that the Parole Commission has acted in violation of its procedures by focusing solely on past convictions, rather than on institutional behaviour. The continued reliance on an unchanging factor, namely, the circumstance of the offence and conduct prior to imprisonment, could result in a due process violation.<sup>5</sup> For the Parole Commission to deny parole release solely because of the violent nature of the offences would constitute such a violation of due process.<sup>6</sup> Nevertheless, although Mr. Peltier's conduct during incarceration has been exemplary for more than four decades, the Parole Commission has repeatedly cited Mr. Peltier's convictions as the sole reason for denying parole.

26. According to the source, despite having suffered physical abuse and conditions that amount to cruel, inhuman or degrading treatment and may amount to torture, Mr. Peltier's record during incarceration has been exemplary. The source estimates that, cumulatively, Mr. Peltier has spent more than five years in solitary confinement. The source adds that prolonged solitary confinement constitutes torture. In addition, Mr. Peltier has been deprived of medical care and physically endangered by the violent actions of other prisoners. He was the target of an attempted assassination plot in 1979. In or around 2009, Mr. Peltier was beaten by other prisoners. Mr. Peltier is kept in an extreme form of lockdown, where he is isolated in his cell 24 hours a day, apart from three one-hour periods each week to make telephone calls and to shower. He is needlessly exposed to conditions that threaten his health and life.

27. The source notes that Mr. Peltier has shown over more than a decade that his commitment to positive institutional behaviour is longstanding and unimpeachable. The Bureau of Prisons has entered three charges against him over four decades of incarceration. All three charges were either for actions taken by Mr. Peltier in self-defence or were erroneously levied against him. Mr. Peltier's disciplinary history demonstrates exceptional strength, grace and courage in the face of extraordinarily challenging and destructive circumstances.

28. Mr. Peltier has focused his energy on art and charitable work, including mentoring Native American youth vulnerable to addiction and suicide, donating art to raise funds for his own communities, and helping start programmes to support Native American health, culture and entrepreneurship. Mr. Peltier has been honoured with international awards for his humanitarian work. Human rights advocates, including a former United Nations High Commissioner for Human Rights, have supported his release.<sup>7</sup>

29. In each of its decisions, the Parole Commission ignored Mr. Peltier's institutional behaviour and medical need in favour of continued reliance on his past convictions. In 2009, the examiner for Mr. Peltier's most recent parole hearing stated that the seriousness of the offences far outweighed his age or medical conditions. The final decision adopted by the Parole Commission cited the original murder conviction and did not mention more recent behaviour.

## g. Anti-Native American bias

30. The source claims that Mr. Peltier has repeatedly been subjected to anti-Native American bias throughout the parole process. For example, the Parole Commission's 1995 interim decision mischaracterized and minimized the extrajudicial killings of more than 60 indigenous people on the Pine Ridge Reservation between 1973 and June 1975, the vast majority of whom were civilians who were not involved in conflict, by referring to these deaths as a conflict between law enforcement and Native American "militants".

31. At the interim hearing in May 1998, the examiner also displayed anti-Native American bias. The examiner's statements suggested that, although he was not convinced that Mr. Peltier had killed the officers, he felt it was warranted to continue to detain Mr. Peltier because the actual killer appeared to have been someone from his Nation. The source

<sup>5</sup> United States Court of Appeals for the Ninth Circuit, *Biggs v. Terhune*, 334 F.3d 910, 30 June 2003.

<sup>6</sup> United States District Court, Eastern District Of New York, *Graziano v. Pataki*, Lexis 52556, 17 July 2006.

<sup>7</sup> Mary Robinson, President, The Mary Robinson Foundation – Climate Justice, "Clemency Petition of Leonard Peltier", letter to the President of the United States, Barack Obama, 12 July 2016.

notes that the examiner indicated that he intended to punish Mr. Peltier for actions committed by an unknown person because the killer appeared to have been part of his indigenous group.

h. Federal Bureau of Investigation influence

32. The source alleges that the Federal Bureau of Investigation targeted Mr. Peltier for his political activism relating to indigenous rights before he was incarcerated and has since continued to exert influence over his case. The interventions in Mr. Peltier's case reflect the agency's history of targeting political dissident groups, particularly those from racial minorities and indigenous communities.

33. Prior to his arrest, Mr. Peltier was an activist with the American Indian Movement. In 1973, the Federal Bureau of Investigation began surveilling and working to infiltrate the Movement to investigate its purported extremist activity. Bureau communications from that time refer to efforts to cultivate informants within the Movement chapters and surveillance of the activities of individual Movement members. From covert surveillance, the Bureau escalated its activities to physical threats. A Bureau memorandum from April 1975 showed that it was preparing to engage in armed confrontation with the Movement.

34. According to the source, the Federal Bureau of Investigation, in a memorandum dated 9 August 1974 – nearly a year prior to the shoot-out – deemed Mr. Peltier to be an American Indian Movement manager. Mr. Peltier was subsequently harassed multiple times by Bureau agents. At the time of Mr. Peltier's trial, the Government dropped charges against his co-defendant so that the full prosecutorial weight of the Federal Government could be directed against Mr. Peltier.

35. On 16 December 2000, around 500 Federal Bureau of Investigation agents marched near the White House after it became clear that President Clinton was considering granting clemency to Mr. Peltier. The source states that Bureau agents had never made such a public and virulent display against the potential release of a prisoner. The protesters delivered a petition to the White House with the signatures of more than 8,000 current and former Bureau agents.

36. In 2016, when President Obama considered granting clemency to Mr. Peltier, the Federal Bureau of Investigation Agents Association posted a letter opposing his release. The letter stated that Mr. Peltier was not remorseful and that there was no question that he had committed the murders of Bureau agents. Aware of the impact of the Bureau's intense opposition, Mr. Peltier's legal team attempted to meet with the then Bureau Director to discuss the clemency petition, but the Bureau responded that it stood by Mr. Peltier's conviction. In 2017, following the presidential decision to deny clemency to Mr. Peltier, the Bureau released a press statement labelling Mr. Peltier as an unremorseful, cold-blooded killer.

37. The source adds that the Federal Bureau of Investigation has actively opposed Mr. Peltier's parole applications. Bureau agents have testified against Mr. Peltier at multiple parole hearings, despite having no apparent connection to the crime. The Bureau is further implicated in attempts to influence Mr. Peltier's case through a website entitled No Parole Peltier, a platform for opponents of Mr. Peltier created by a Bureau Special Agent in April 2000, when he was still an active Bureau member. The persons operating the site respond to publications by the Leonard Peltier Defense Committee and seek to rebut allegations of Bureau misconduct associated with Mr. Peltier's trial.

38. According to the source, when the Washington State Department of Labor and Industries displayed paintings by Mr. Peltier at a 2015 Native American heritage month exhibition, former Federal Bureau of Investigation agents wrote to the Department criticizing the inclusion of his work. The Department removed Mr. Peltier's paintings from the exhibition two weeks earlier than originally planned. A court later found that Mr. Peltier's artwork had been improperly removed in response to pressure from the former Bureau agents and that there had been no compelling government interest for the removal of the paintings.

i. Legal analysis

39. The source submits that Mr. Peltier's detention is arbitrary under categories I and III. Even if a detention was lawful at its inception, it can become unlawful once the individual has completed serving the sentence or when the circumstances that justified the detention have changed.<sup>8</sup> This is the case with Mr. Peltier's detention. Although the Working Group did not find that Mr. Peltier's detention was arbitrary in 2005, the circumstances have changed and the continued deprivation of his liberty 17 years later has now become arbitrary.

1. Category I: No basis for detention

40. The source claims that the continued detention of Mr. Peltier is arbitrary because the Government cannot invoke any legal basis justifying its continued deprivation of his liberty. Mr. Peltier's detention meets this criterion for three reasons: (a) the time Mr. Peltier has served is vastly disproportionate to the sentences normally imposed for the crime of which he was convicted; (b) his detention is indefinite; and (c) there is no legitimate purpose for his detention.

Prolonged sentence

41. According to the source, Mr. Peltier's detention is arbitrary because it is prolonged. He has been made to serve a sentence five times longer than that served by others convicted of similar crimes. In 1976, the Federal Government set parole eligibility for persons sentenced to life imprisonment at 10 years, with reductions in time possible for good behaviour. In 1985, even individuals given life sentences after being convicted of murder by federal courts were released on parole after an average of 8.8 years. By these standards, Mr. Peltier, who was sentenced to two consecutive life sentences in 1977, should have served, at most, 17.6 years. Instead, he has been incarcerated for more than 40 years, the equivalent of almost five times the length of a prison sentence normally served by those given a life sentence.

42. Even by the more punitive standards of today, the length of Mr. Peltier's detention is out of proportion. In 2015, individuals sentenced by United States federal courts to life imprisonment for murder served an average of 27.4 years before being paroled. Mr. Peltier has been in prison for almost half a century.

43. In its 2016 visit to the United States, the Working Group identified disproportionate sentencing as one of the key sources of arbitrary detention.<sup>9</sup> Mr. Peltier's case is an example of this systemic problem in the United States criminal justice system.

Indefinite detention

44. The source claims that Mr. Peltier's detention is arbitrary because it is indefinite. It is indefinite because, even though the Government has admitted that it cannot prove that Mr. Peltier committed the murders for which he was incarcerated, the Parole Commission has repeatedly denied Mr. Peltier's requests for parole and the Government has failed to order his release. Instead, the Parole Commission has continued to hold Mr. Peltier on the alternate theory that he aided and abetted the murders, despite the fact that Mr. Peltier was never found guilty at trial of aiding and abetting a murder. Such a finding would have violated the United States extradition treaty with Canada, which requires that the crime with which a person is charged in the United States be the crime upon which that person was extradited.

45. According to the source, the fact that the Bureau of Prisons now continues to deny Mr. Peltier parole on the basis that he may have aided and abetted the murders amounts to incarcerating Mr. Peltier for a crime for which he has never been found guilty in a court. Detaining a person without a trial is the very definition of indefinite detention. Continuing to detain Mr. Peltier violates article 9 of the Covenant. Such indefiniteness in itself renders Mr. Peltier's detention arbitrary and raises further doubt as to whether his trial was fair in the first instance.

<sup>8</sup> See, e.g., *Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002).

<sup>9</sup> A/HRC/36/37/Add.2, paras. 50, 60–61 and 88.

#### No legitimate purpose for continued detention

46. The source claims that Mr. Peltier's detention is arbitrary because his detention serves no legitimate purpose. Under guideline 15 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court,<sup>10</sup> a reviewing court should consider whether a detained person's changed circumstances, including changes in health, justify continued detention. The Working Group has held on a previous occasion that there is no legitimate reason to detain an elderly and unwell man who poses no threat to others.<sup>11</sup>

47. At the time of the petition, Mr. Peltier was 75 years old and in poor health. He has a large and potentially fatal aortic aneurysm that could burst at any time, instantly killing him. Mr. Peltier's next reconsideration hearing will not be held until 2024. At that point, Mr. Peltier will be almost 80 years old, if he lives that long. Mr. Peltier poses no threat to anyone. There is no legitimate purpose for the Government to continue his detention. Doing so despite the lack of a legitimate purpose amounts to arbitrary detention under category I.

#### 2. Category III: Procedural deficiencies

48. The source recalls that, even when no individual defect considered alone would render a detention arbitrary, a number of defects can cumulatively indicate that detention is indeed arbitrary.<sup>12</sup> The present case is such a case. The cumulative effect of the procedural deficiencies that Mr. Peltier has suffered in parole proceedings are overwhelming, rendering his continued detention arbitrary.

#### Right to due process in parole proceedings

49. The source notes that the right to due process is applicable in parole proceedings. Mr. Peltier's due process rights have been violated both because the Parole Commission itself is not under the control of a judicial authority, in contravention of principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and because the parole proceedings in Mr. Peltier's case have been unreasonable and lacking in transparency.

50. Under principle 4 of the Body of Principles, any form of detention "shall be ordered by, or be subject to the effective control of, a judicial or other authority". For the purposes of the Body of Principles, a "judicial or other authority" means "a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence". The Government has recognized that the Parole Commission does not meet this standard. The rationale for passing the Sentencing Reform Act of 1984, which eliminated the role of the Parole Commission in all cases tried after 1984, was in large part to remedy the arbitrary and unfair outcomes that the Parole Commission had generated. Nevertheless, Mr. Peltier remains subject to the control of the Parole Commission, and no judicial body supervises the Commission's decisions.

51. Furthermore, the Commission's proceedings in the present case have been unreasonable, highly subjective and lacking in transparency, in violation of Mr. Peltier's due process rights. Due process requires that the Parole Commission make its decision on the basis of new, individualized determinations at each hearing, particularly focusing on contemporary circumstances, including the petitioner's conduct while incarcerated. The Commission's protocols require that the examiner refrain from predetermining the outcome of a hearing, requiring decisions to be made only at the conclusion of the hearing.

52. In Mr. Peltier's case, the Commission has deviated from these procedural requirements. Mr. Peltier has accomplished substantial charitable and advocacy work while incarcerated. Nothing in his conduct suggests that continued detention is warranted. Nonetheless, the Parole Commission has voted repeatedly to continue Mr. Peltier's detention, basing its decision on factors unrelated to his conduct while incarcerated. On at least one

<sup>10</sup> A/HRC/30/37, annex.

<sup>11</sup> Opinion No. 7/2017, paras. 44–45.

<sup>12</sup> Opinion No. 34/2000 (E/CN.4/2002/77/Add.1), para. 23.



occasion, an examiner reached a decision before fully considering the evidence in Mr. Peltier's favour, suggesting an unlawful, automatic predetermination of the Commission's decision. The Commission's decision to remove an examiner from his post after his recommendation that Mr. Peltier be released was unreasonable and lacking in transparency.

53. When considered cumulatively, the individual elements of the Commission's conduct violate article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.<sup>13</sup> Mr. Peltier's ongoing detention should therefore be regarded as arbitrary under category III.

#### Freedom from torture and ill-treatment

54. The source claims that the authorities have violated Mr. Peltier's right to be free from torture and ill-treatment. Despite the Government's legal obligation to prevent torture within its jurisdiction, Bureau of Prisons officials have nonetheless condoned torturing Mr. Peltier, both through the use of solitary confinement and by withholding necessary medical care.

55. The authorities have repeatedly held Mr. Peltier in solitary confinement in a cell with no air conditioning and without adequate ventilation. In 2011, the authorities ordered Mr. Peltier to spend six months in solitary confinement. During this time, he spent 23 hours a day in his cell, for five days a week, and he spent all 24 hours of the day in his cell twice a week. Since COVID-19 began spreading in federal prisons, Mr. Peltier has again been placed in solitary confinement, repeatedly spending up to 14 days at a time isolated in his cell. By limiting Mr. Peltier's isolation to 14-day stretches, the Bureau of Prisons avoids exceeding the 15-day limit on solitary confinement. Nevertheless, these periods of solitary confinement, in combination, inflict the psychological damage that the 15-day limit is meant to prevent. Shorter uses of solitary confinement, particularly when used repeatedly, can still amount to torture.

56. Although the Bureau of Prisons claims that solitary confinement is necessary to prevent the spread of COVID-19, health experts have warned that it can weaken immune systems, which may render those placed in solitary confinement more likely to contract and die of COVID-19 when they are released from isolation. Fear of being placed in isolation may also deter people from reporting symptoms, leading to further transmission and worse health outcomes for those who try to hide their infection. The World Health Organization and the Office of the United Nations High Commissioner for Human Rights released a joint statement noting that the isolation of prisoners in response to COVID-19 should be imposed only as a last resort if no alternative protective measures can be taken. In no case should quarantine or medical isolation result in de facto solitary confinement.<sup>14</sup> The Bureau of Prisons has violated these standards, moving prisoners into isolation before exhausting other options and forcing prisoners to isolate individually instead of in groups, resulting in de facto and unwarranted solitary confinement.

57. Withholding necessary and proper care can contribute to a finding of ill-treatment or torture. The Bureau of Prisons withheld care from Mr. Peltier by failing to ensure that he had access to surgery for his aortic aneurysm and by failing to take adequate steps to protect him from the threat of COVID-19. Mr. Peltier is particularly vulnerable to COVID-19 given his advanced age and multiple pre-existing medical conditions. Withholding appropriate medical care constitutes a violation of his right to be free from cruel treatment and torture.

#### *Response from the Government*

58. On 10 December 2021, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting it to provide detailed information by 8 February 2022 about the situation of Mr. Peltier. The Working Group requested the Government to clarify the provisions justifying his continued detention, as well as its compatibility with international human rights law.

<sup>13</sup> Opinions No. 33/1999 and No. 34/1999 (E/CN.4/2001/14/Add.1).

<sup>14</sup> See [https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty\\_0.pdf](https://interagencystandingcommittee.org/system/files/2020-11/IASC%20Interim%20Guidance%20on%20COVID-19%20-%20Focus%20on%20Persons%20Deprived%20of%20Their%20Liberty_0.pdf).

59. On 8 February 2022, the Government requested an extension of the deadline for its response. The extension was granted, with a new deadline of 11 February 2022. The Government submitted its response on 11 February 2022.

60. The Government notes that the Working Group previously assessed Mr. Peltier's claim of arbitrary detention in 2005 and rejected it, reasoning that Mr. Peltier "was given an opportunity to raise all the complaints listed ... before the national appellate courts, which, in well-reasoned decisions, dismissed them".<sup>15</sup> Indeed, more than a dozen federal judges have reviewed his numerous challenges (all made with the assistance of legal counsel) to his conviction and denials of parole and have rejected them, repeatedly determining that Mr. Peltier received a fair trial. The record more than supports the jury's verdict that he murdered two Federal Bureau of Investigation Special Agents.<sup>16</sup> Even though the federal courts have specifically rejected most of the source's allegations, the Government underscores several facts.

61. First, Mr. Peltier was convicted by strong evidence of first-degree murder. The source's allegations repeatedly state that Mr. Peltier was never convicted of aiding and abetting. However, aiding and abetting is not a stand-alone crime. Mr. Peltier was convicted of first-degree murder (either by personally committing the murders or by aiding and abetting their commission). As every court that has reviewed the present case has determined, the two Federal Bureau of Investigation Special Agents were wounded in a gun battle and then murdered at point-blank range with an AR-15 firearm linked to Mr. Peltier by eyewitness testimony and ballistic analysis.

62. The Government recalls that "no witness testified that anyone other than Peltier was seen firing an AR-15 at the agents' cars, or that anyone other than Peltier was seen by the agents' cars with an AR-15".<sup>17</sup> In addition, witnesses at trial placed Mr. Peltier at the crime scene. With that and the volume of other strong evidence, the United States presented the first-degree murder case to the jury on two alternate theories: (a) Mr. Peltier personally murdered the two Federal Bureau of Investigation Special Agents; or (b) Mr. Peltier aided and abetted the murders by handing over his AR-15 firearm to another person who pulled the trigger on Mr. Peltier's AR-15.<sup>18</sup> That theory of guilt has never changed. The United States has always maintained that Mr. Peltier is guilty of first-degree murder either by personally committing the murder or murders or by aiding and abetting their commission.<sup>19</sup>

63. Second, the Government emphasizes that the Parole Commission has not violated Mr. Peltier's rights by denying parole. Mr. Peltier was sentenced seven years before the United States Congress abolished parole in 1984 for all federal inmates. He is one of the very few federal inmates who is eligible for parole hearings. Mr. Peltier has had several full and interim parole hearings and was represented by a lawyer at all of them (legal representation is not mandated by law). At all of his parole hearings, the Parole Commission applied federal parole standards established by statute and regulation. Mr. Peltier's most recent parole hearing was in July 2009, and he was eligible for an interim parole hearing in July 2011. He may apply at any time for reconsideration and will then be scheduled for a hearing.

64. The source asserts that Mr. Peltier's conduct in prison has been exemplary, failing to mention that two years after sentencing, he escaped from prison. He and his fellow escapees fired shots at prison staff in the course of their breakout. While a fugitive, Mr. Peltier

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<sup>15</sup> Opinion No. 15/2005, para. 10.

<sup>16</sup> United States Court of Appeals for the Eighth Circuit, *United States v. Peltier*, 585 F.2d 314, 14 September 1978 (finding that the evidence of Mr. Peltier's guilt was "strong"); United States Court of Appeals, Tenth Circuit, *Peltier v. Booker*, 348 F.3d 888, 4 November 2003 (considering the history of Federal Court review of Mr. Peltier's conviction and denials of parole); and United States Court of Appeals for the Eighth Circuit, *Peltier v. Federal Bureau of Investigation*, 563 F.3d 754, 29 April 2009.

<sup>17</sup> United States Court of Appeals for the Eighth Circuit, *United States v. Peltier*, 800 F.2d 772, 11 September 1986.

<sup>18</sup> *Peltier v. Federal Bureau of Investigation*, 563 F.3d.

<sup>19</sup> United States Court of Appeals for the Eighth Circuit, *Peltier v. Henman*, 997 F.2d; and *Peltier v. Booker*, 348 F.3d.

reportedly committed armed robbery.<sup>20</sup> Based on the seriousness of his crime, in murdering two federal agents and then escaping from prison by firing shots at prison staff, it strains credulity for Mr. Peltier to claim that his incarceration is arbitrary or unprecedented.

65. Mr. Peltier is presently designated to the Coleman Federal Correctional Complex, United States Penitentiary-I. He is not in solitary confinement. He is currently housed in general population in A-Unit. He has been housed in general population since 20 December 2018. The last time he was in the Special Housing Unit was from 10 to 11 May 2018. Due to incidents involving the safety and security of the institution, it has been necessary for Penitentiary-I to be placed on lockdown at various times. During lockdowns, medical staff make rounds twice a day to conduct pill line, administer insulin and address any medical concerns. The Unit Team makes rounds daily and the Unit Officer makes rounds every 30 minutes. Should Mr. Peltier have any concerns, medical or otherwise, he has multiple opportunities to raise them with a variety of staff members on a daily basis.

66. The medical care provided at Penitentiary-I is commensurate with Mr. Peltier's medical conditions and is consistent with current standards of care. Penitentiary-I is accredited by The Joint Commission, an independent organization that provides health-care accreditation to more than 22,000 health-care entities. The Bureau of Prisons advises that Mr. Peltier continues to receive appropriate medical care to address his medical conditions. The Government is unable to disclose more detailed information due to privacy concerns, unless Mr. Peltier gives his written consent for it to do so.

*Additional comments from the source*

67. The source asserts that the Government has not contested several assertions, including Mr. Peltier's medical conditions, the alleged violations of Mr. Peltier's due process rights by the Parole Commission or the Federal Bureau of Investigation's ongoing influence in his case. Furthermore, the Government does not dispute that Mr. Peltier has engaged in charitable work during his incarceration and that the Parole Commission has repeatedly refused to release him purely on the basis of criminal convictions from 45 years ago.

68. Mr. Peltier is not receiving adequate medical care. He tested positive for COVID-19 in January 2022 and remains at heightened risk of death owing to complications caused by the virus. The Government claims that his medical care is consistent with current standards of care, without referring to the source of those standards.

69. The Government's argument that the Parole Commission applied federal parole standards is inconsistent with the due process violations during Mr. Peltier's parole hearings. In addition, the Government does not respond to the argument that there is no judicial body that supervises the Commission. While the Government states that Mr. Peltier is one of the few federal inmates eligible for parole hearings, federal inmates sentenced after Congress abolished parole are eligible for supervised release. Supervised release is controlled by the federal district courts and is more protective of due process rights. Furthermore, there is no significance to Mr. Peltier being legally represented at his parole hearings when the examiner at his interim hearing in 2000 did not examine arguments from his lawyers. Lastly, one of the prosecutors recently explained that the prosecution theory changed at least three times during Mr. Peltier's trial and appeal.<sup>21</sup>

**Discussion**

70. The Working Group thanks the parties for their submissions, which raise several preliminary matters.

71. First, the Working Group has previously adopted an opinion in relation to Mr. Peltier. In opinion No. 15/2005, adopted on 26 May 2005, the Working Group found that the information provided was not sufficient to conclude that the "allegedly longer time before the grant of parole than usually required would have made the prison sentence being served by Mr. Peltier arbitrary" (para. 9). Furthermore, Mr. Peltier was given an opportunity to raise

<sup>20</sup> *Peltier v. Booker*, 348 F.3d, 889–890.

<sup>21</sup> See Jonathan P. Baird, "It's time to release Leonard Peltier" *Concord Monitor*, 20 December 2021.

all the complaints listed in the communication before the national appellate courts which, in well-reasoned decisions, dismissed them (para. 10). Noting that it is not mandated to be a substitute appellate court, the Working Group concluded that Mr. Peltier's detention was not arbitrary.

72. The source seeks a new opinion based on the change in Mr. Peltier's circumstances. According to the source, since the initial opinion was adopted, information has come to light regarding a pattern of procedural and substantive injustice against Mr. Peltier during his parole proceedings. His detention has been prolonged by parole officials who have departed from guidelines and failed to follow regulations pertaining to the granting of parole.

73. The Working Group has adopted more than one opinion on the same case when the circumstances have changed or there are new issues warranting further consideration.<sup>22</sup> In the present case, the Working Group considers it appropriate to adopt a new opinion, noting that almost 17 years have passed since opinion No. 15/2005 was adopted. While the initial petition focused on evidentiary and other problems at trial and the longer sentence resulting from the denial of parole, the current submission alleges new violations of Mr. Peltier's rights during his parole proceedings. Moreover, Mr. Peltier's health has reportedly deteriorated since the original opinion was adopted, and his medical conditions place him at high risk of death from COVID-19 complications. The Working Group wishes to consider whether these conditions might have affected Mr. Peltier's ability to participate in his parole proceedings. Lastly, the Working Group added category V to its methods of work in 2010, allowing it to consider allegations of detention on discriminatory grounds.<sup>23</sup> Given the alleged anti-Native American bias during Mr. Peltier's parole proceedings, the Working Group will consider whether his ongoing detention is arbitrary under this category.

74. Second, the Working Group has clarified in its jurisprudence that it is mandated to consider allegations of arbitrary detention when an individual is seeking release through parole proceedings.<sup>24</sup> While the consideration of parole often takes place years after the trial and appellate proceedings, the grant or denial of parole has an impact on whether an individual remains in detention, thus falling within the Working Group's mandate. Parole proceedings must be conducted in accordance with international standards.<sup>25</sup> The denial of parole may result in a sentence being arbitrary under article 9 of the Covenant.<sup>26</sup>

75. Third, as the Working Group emphasized in opinion No. 15/2005, its purpose is not to substitute itself for the national authorities.<sup>27</sup> It refrains from examining matters that are for the national authorities to determine. In the present case, this includes whether aiding and abetting is a separate offence under United States law, the sufficiency of the evidence against Mr. Peltier, and whether his conduct has been exemplary during his incarceration. Rather, the Working Group will consider whether the process adopted by the Parole Commission in considering parole in Mr. Peltier's case met international standards. While Mr. Peltier's detention was not arbitrary in 2005, it may have become arbitrary as it progressed over time.

76. In determining whether Mr. Peltier's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case of breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if

<sup>22</sup> See e.g. opinions No. 42/2019, No. 89/2017, No. 50/2014, No. 12/2010 ([A/HRC/16/47/Add.1](#), p. 71, and [A/HRC/16/47/Add.1/Corr.1](#)), and No. 46/2008 ([A/HRC/13/30/Add.1](#), p. 130).

<sup>23</sup> [A/HRC/36/38](#), para. 8 (e). The Working Group was established in 1991, and added category V in 2010, after some violations allegedly occurred. However, Mr. Peltier remains in detention and the alleged violations are ongoing and fall within its mandate. See opinion No. 69/2019, para. 50.

<sup>24</sup> See opinions No. 32/2016, No. 23/2013, No. 34/2000 and No. 31/1999 ([E/CN.4/2001/14/Add.1](#), p. 28); and [A/HRC/36/37/Add.2](#), paras. 48 and 60.

<sup>25</sup> Opinions No. 23/2013, para. 26; and No. 34/2000, para. 23.

<sup>26</sup> *De León Castro v. Spain* ([CCPR/C/95/D/1388/2005](#)), para. 9.3; Human Rights Committee, general comment No. 35 (2014), para. 20 (noting that parole must not be denied on grounds that are arbitrary within the meaning of art. 9). While the United States ratified the Covenant on 8 June 1992, article 9 of the Universal Declaration of Human Rights applied to parole proceedings before that date, and the alleged violations are ongoing.

<sup>27</sup> Opinions No. 15/2021, para. 93; No. 46/2020, para. 62; and No. 64/2019, para. 89.

it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations.<sup>28</sup>

### *Category I*

77. According to the source, Mr. Peltier's detention is arbitrary because it is prolonged. The source compares Mr. Peltier's sentence with the average time served by individuals sentenced by federal courts to life imprisonment for murder before they were released on parole, which was 8.8 years in 1985 and 27.4 years in 2015.<sup>29</sup> Mr. Peltier has been incarcerated for nearly half a century. During its 2016 visit to the United States, the Working Group identified disproportionate sentencing as a systemic problem that places defendants at high risk of arbitrary detention.<sup>30</sup> The Government did not address these allegations.

78. While the sentence currently being served by Mr. Peltier is extremely long and appears to be significantly longer than those being served in similar cases in which other detainees were granted parole, the Working Group is not convinced that this renders his detention arbitrary and without legal basis. The two consecutive sentences of life imprisonment imposed on Mr. Peltier – whether imposed for an offence categorized as murder or aiding and abetting – relate to the death of two Federal Bureau of Investigation agents who were shot with a firearm, an extremely serious offence. By contrast, the Working Group has found detention to be arbitrary because it is based on a disproportionate sentence when the underlying offence related to the exercise of a right rather than a crime,<sup>31</sup> or when a heavy sentence is imposed for a minor offence.<sup>32</sup>

79. However, the disparity between Mr. Peltier's sentence and the average time served by other federal inmates for comparable offences may suggest that the process adopted by the Parole Commission was flawed, or that Mr. Peltier's continued detention was the result of discrimination. These issues are considered under categories III and V.

80. In addition, the source claims that Mr. Peltier's detention is arbitrary because it is indefinite. It is indefinite because, even though the Government has admitted that it cannot prove that Mr. Peltier committed the murders for which he was incarcerated, the Parole Commission continues to detain him on the alternate theory that he aided and abetted the murders. Mr. Peltier was never found guilty of this offence at trial. In its response, the Government states that aiding and abetting is not a stand-alone crime. Mr. Peltier was convicted of first-degree murder, either by personally committing the murders or by aiding and abetting in their commission. The Government presented the first-degree murder case to the jury on two alternate theories that Mr. Peltier personally murdered the two Federal Bureau of Investigation agents, or that he aided and abetted in the commission of the murders by handing over his firearm to another person who pulled the trigger. According to the Government, that theory of guilt has never changed.

81. As noted above, the question of whether aiding and abetting is a separate offence under United States law is not a matter which the Working Group is competent to determine. Moreover, given the conflicting arguments presented by the source and the Government as to whether Mr. Peltier was convicted of first-degree murder by aiding and abetting, the Working Group is not in a position to make any finding on this matter. As a result, the Working Group is unable to conclude that Mr. Peltier is being detained indefinitely for a crime for which he has never been found guilty. Moreover, according to the Government,

<sup>28</sup> [A/HRC/19/57](#), para. 68.

<sup>29</sup> It is not clear whether the 27.4 years cited by the source has been doubled to serve as an appropriate point of comparison with Mr. Peltier's two consecutive life sentences.

<sup>30</sup> [A/HRC/36/37/Add.2](#), paras. 50, 60–61 and 88.

<sup>31</sup> See e.g. opinions No. 48/2012, paras. 18–19 (10 years' imprisonment for exercising the freedom of expression); and No. 41/2008 ([A/HRC/13/30/Add.1](#), p. 105), paras. 11, 16 and 18 (sentences ranging from 10 years to life imprisonment for five minutes of dancing and unfurling a flag in non-violent political protest).

<sup>32</sup> See e.g. opinion No. 40/2016, para. 44 (8 years' imprisonment followed by 5 years of house arrest for photojournalism and spraying graffiti on a public school).

Mr. Peltier may apply at any time for reconsideration of his parole, suggesting that his detention is not indefinite.<sup>33</sup>

82. Lastly, the source claims that Mr. Peltier's detention is arbitrary because it serves no legitimate purpose. Mr. Peltier suffers from significant health problems and his next parole hearing will not be held until 2024, when he will be almost 80 years old. Mr. Peltier poses no threat and there is no legitimate purpose to continue his detention. The Government did not address this submission.

83. The source has established a credible case that Mr. Peltier is experiencing significant health issues and is at high risk of COVID-19 complications. However, the Working Group is not convinced that his detention lacks legal basis. The legal basis for Mr. Peltier's detention remains his conviction at trial, confirmed on appeal, that he was responsible for the death of two Federal Bureau of Investigation agents.<sup>34</sup> His deteriorating health and advancing age may, however, be relevant in assessing whether he can effectively participate in his parole proceedings, as discussed below.

84. For these reasons, the Working Group is unable to find that Mr. Peltier's detention is arbitrary under category I.

### *Category III*

85. The source argues that the cumulative effect of the procedural deficiencies during Mr. Peltier's parole proceedings renders his continued detention arbitrary. The right to due process applies during parole proceedings, and violations of that right may render the detention arbitrary under category III.<sup>35</sup>

86. According to the source, the Parole Commission implemented a procedure in 1977 requiring that prisoners with no minimum sentence be informed of their presumptive parole release date. Mr. Peltier was never informed of this date, as required. In 1981, the Parole Commission updated its mechanism for evaluating prisoners for parole, but Mr. Peltier was not evaluated according to the new standard. When the Sentencing Reform Act was implemented in 1984, Mr. Peltier was one of the prisoners who, by law, should have received a release date during the five-year transition period established under the legislation. This release date would have been in 1992, but Mr. Peltier has never been given a release date.

87. The Government asserts that Mr. Peltier was sentenced seven years before Congress abolished parole in 1984 for all federal inmates, and he is one of the very few federal inmates eligible for parole hearings. He has had several full and interim parole hearings and was legally represented at all of them. While the Government states that the Parole Commission applied federal parole standards, notably, it did not directly address the alleged failure by the Commission to comply with its own standards and procedures.

88. The Working Group recalls that consideration for parole must be carried out in accordance with the law.<sup>36</sup> The source has presented a credible case for the argument, which was not rebutted by the Government, that Mr. Peltier was not afforded his rights under applicable law and procedures, in violation of article 9 (1) of the Covenant.

89. In addition, the source alleges that irregularities occurred during Mr. Peltier's parole hearings. In 1995, the examiner found that the evidence did not support Mr. Peltier's murder conviction and concluded that his incarceration was unfounded. The Parole Commission ignored this conclusion, accepting the recommendation of a second examiner, who was not present at the hearing, to deny parole. In June 2000, the examiner did not read or examine arguments from Mr. Peltier's lawyers, and recommended that parole be denied before the hearing was concluded. Furthermore, before Mr. Peltier's second full parole hearing in July

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<sup>33</sup> In opinion No. 22/2004 (E/CN.4/2006/7/Add.1, p. 10), cited by the source, an individual was held for an unspecified period with no apparent means of seeking release (para. 11).

<sup>34</sup> In opinion No. 7/2017, cited by the source, the Working Group stated that there was no legitimate reason for detaining an elderly man with health problems, but did not find that this, of itself, rendered his detention arbitrary (paras. 44–45).

<sup>35</sup> Opinion No. 34/2000, para. 23.

<sup>36</sup> Human Rights Committee, general comment No. 35 (2014), para. 20.

2009, his lawyer informed him that the Government had said that it would not oppose parole. A representative of the Parole Commission had also indicated that Mr. Peltier would be considered a suitable candidate for parole, but he was again denied parole.<sup>37</sup> The Government did not address these allegations. Taken together, these irregularities suggest that the Parole Commission did not objectively and substantively consider whether parole should be granted to Mr. Peltier, in violation of article 9 (1) of the Covenant. The Commission does not appear to have acted in an impartial manner in the present case.

90. The source further alleges that the Parole Commission has ignored Mr. Peltier's exemplary behaviour while incarcerated and his medical needs in favour of continued reliance on an unchanging factor, namely, his past convictions. In 2009, the examiner for Mr. Peltier's most recent parole hearing relied exclusively on his convictions. The Government asserts that Mr. Peltier's conduct has not been exemplary, referring to his escape from prison and armed robbery. It did not, however, address the allegation that the Parole Commission only considered Mr. Peltier's past convictions, rather than his current behaviour.

91. The Working Group has stated that, when considering parole, the relevant criteria must be the detainee's conduct while serving his or her sentence.<sup>38</sup> In the present case, the Working Group is of the view that the consideration by the Parole Commission of factors unrelated to Mr. Peltier's current conduct – such as his conviction, which was already taken into account during sentencing – has resulted in his ongoing detention for a longer period than other detainees convicted of similar offences, in violation of article 9 (1) of the Covenant.

92. In addition, the source claims that Mr. Peltier's due process rights have been violated because the Parole Commission is not under the control of a judicial authority. However, the Government states that numerous challenges by Mr. Peltier to the denial of parole have been reviewed by federal judges. The Working Group finds no violation on this issue.

93. Lastly, the source claims that the authorities have violated Mr. Peltier's right to freedom from torture and ill-treatment through the use of solitary confinement and the withholding of medical care. Cumulatively, Mr. Peltier has spent over five years in solitary confinement and has been placed in solitary confinement during the COVID-19 pandemic. The Bureau of Prisons failed to ensure that he had access to surgery and has not taken adequate steps to protect him from COVID-19. In response, the Government states that Mr. Peltier was last held in the Special Housing Unit in May 2018. Mr. Peltier continues to receive appropriate medical care to address his medical conditions, including during lockdowns.

94. The Working Group recalls that solitary confinement may amount to torture.<sup>39</sup> It must be used only in exceptional cases as a last resort, for as short a time as possible, subject to independent review and authorized by a competent authority.<sup>40</sup> Similarly, the withholding of medical treatment may amount to torture or ill-treatment.<sup>41</sup> According to article 10 (1) of the Covenant, all persons deprived of their liberty must be treated with humanity and dignity, including receiving appropriate medical care.<sup>42</sup> States should treat detainees over 60 years of age and those with underlying health conditions as vulnerable to COVID-19, refraining from holding them in facilities where the risk to their life is heightened and implementing early release schemes whenever possible.<sup>43</sup>

95. The Working Group is not convinced that Mr. Peltier is able to effectively participate in his parole proceedings,<sup>44</sup> even with the assistance of his lawyers. His next parole hearing is due to be held in 2024, when he will be almost 80 years old. It is unlikely that this will be

<sup>37</sup> Opinion No. 34/2000, para. 23 (finding that the denial of parole following statements by the authorities that parole would be granted was a factor rendering the detention arbitrary).

<sup>38</sup> Ibid.

<sup>39</sup> General Assembly resolution 68/156, para. 28; A/66/268, para. 71; A/HRC/36/37/Add.2, paras. 63–65 and 93 (g); CAT/C/USA/CO/3-5, para. 20; and CCPR/C/USA/CO/4, para. 20.

<sup>40</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), rule 45; and opinions No. 61/2020, para. 85; and No. 52/2018, para. 79 (d).

<sup>41</sup> *Kabura v. Burundi* (CAT/C/59/D/549/2013), para. 7.8.

<sup>42</sup> Opinion No. 26/2017, para. 66.

<sup>43</sup> Working Group on Arbitrary Detention, deliberation No. 11 (A/HRC/45/16, annex II), paras. 15–16.

<sup>44</sup> Opinions No. 70/2019, para. 74; No. 59/2019, para. 69; and No. 29/2017, para. 63.

a realistic opportunity for Mr. Peltier, an elderly detainee in ill health, to seek parole and to benefit from due process. The Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Independent Expert on the enjoyment of all human rights by older persons.

96. The Working Group finds that Mr. Peltier's detention is arbitrary under category III.

#### *Category V*

97. The source claims that Mr. Peltier has been subjected to anti-Native American bias throughout the parole process. In its 1995 interim decision, the Parole Commission referred to the death of more than 60 indigenous people on the Pine Ridge Reservation between 1973 and 1975 as a conflict between law enforcement and Native American "militants". In May 1998, the examiner suggested that it was appropriate to continue to detain Mr. Peltier because the actual killer appeared to have been someone from his indigenous group. Furthermore, Mr. Peltier's parole and clemency applications have been strongly opposed by the Federal Bureau of Investigation, which appears to have an interest in the case not only because of the death of its two agents, but also owing to Mr. Peltier's former activism on indigenous rights with the American Indian Movement.<sup>45</sup> As noted above, Mr. Peltier has served a significantly longer sentence than others granted parole for similar offences. The Government did not address these allegations.

98. The Working Group concludes that Mr. Peltier continues to be detained because he is Native American, contrary to articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. The Government has expressed its understanding in relation to articles 2 (1) and 26 of the Covenant that distinctions based on factors such as race or national or social origin are permitted when they are rationally related to a legitimate government objective.<sup>46</sup> However, the Government has not explained how the present case was compatible with articles 2 (1) and 26 of the Covenant or its understanding of these provisions.

99. The Working Group finds that Mr. Peltier's detention is arbitrary under category V and refers the present case to the Special Rapporteur on the rights of indigenous peoples.

#### *Concluding remarks*

100. The Working Group does not condone the killing of law enforcement officers and this opinion should not be understood as in any way minimizing the gravity of the events that took place in 1975 in South Dakota, which led to Mr. Peltier's conviction. However, States must afford due process to defendants at all stages of a criminal matter, including parole proceedings, in accordance with the Covenant, violations of which have been identified in the present case.<sup>47</sup>

#### **Disposition**

101. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Leonard Peltier, being in contravention of articles 2, 7 and 9 of the Universal Declaration of Human Rights and articles 2 (1), 9 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories III and V.

102. The Working Group requests the Government of the United States to take the steps necessary to remedy the situation of Mr. Peltier without delay and bring it into conformity

<sup>45</sup> A/HRC/36/46/Add.1, para. 93 (referring to Mr. Peltier's case as the criminalization of indigenous dissent).

<sup>46</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec).

<sup>47</sup> Opinions No. 62/2020, para. 77; and No. 59/2020, para. 52.



with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

103. The Working Group considers that, taking into account all the circumstances of the case, including the risk to Mr. Peltier's health, the appropriate remedy would be to release Mr. Peltier immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.<sup>48</sup> In the current context of the COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Peltier.

104. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Peltier and to take appropriate measures against those responsible for the violation of his rights.

105. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Independent Expert on the enjoyment of all human rights by older persons, and the Special Rapporteur on the rights of indigenous peoples, for appropriate action.

106. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

#### **Follow-up procedure**

107. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Peltier been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Peltier;
- (c) Whether an investigation has been conducted into the violation of Mr. Peltier's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United States with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

108. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

109. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

110. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>49</sup>

*[Adopted on 30 March 2022]*

<sup>48</sup> Working Group on Arbitrary Detention, deliberation No. 10 (A/HRC/45/16, annex I).

<sup>49</sup> Human Rights Council resolution 42/22, paras. 3 and 7.